

No. 11638

United States
Circuit Court of Appeals
For the Ninth Circuit

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND
ALLIED WORKERS OF AMERICA, JEFF KIBRE,
GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R.
SMITH, GEORGE KNOWLTON, OTIS W. SAWYER,
W. B. McCOMAS, HARRY A. McKITTRICK, ARTHUR
D. HILL, C. LLOYD MUNSON, CHARLES McLAUCH-
LAN, ROBERT M. PHELPS, BURT D. LACKYARD,
and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Six Volumes
VOLUME VI
Pages 2251 to 2583

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

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(Testimony of William S. Robinson.)

The Witness: Yes, but there are not many school teachers who have been school teachers for 25 years who thereupon marry.

The Court: How do you know?

The Witness: I can establish that fact, if you would like me to, from the census.

The Court: The census figures reflect that, do they?

The Witness: No, the Bureau of Census vital statistics will, giving age of marriage.

The Court: Well, suppose that a girl was a waitress and got married, do you think that that would affect her attitude?

The Witness: Well, I think it probably would.

The Court: Let us take a specific illustration. In San Pedro they had a strike some years ago when I was on the Superior Court, or we discovered there that the waitresses belonged to the A. F. of L., and most of them were married to longshoremen who belonged to the C. I. O.

The Witness: But they both belonged to labor unions, didn't they, and they weren't Republicans, very likely.

The Court: I haven't any idea except that there was such a state of violence there that they had to close up the whole San Pedro area. Now, would they be apt to take on their husband's point of view or their own, I mean that class of women?

The Witness: As far as the broad classification and the social attitudes go here, you are [375]

(Testimony of William S. Robinson.)

talking about attitudes in a very specific situation, and I am talking about the attitudes as distinguished, let's say, between laborers and professional men. I think that a woman who marries a professional man will have the same social attitudes that professional men in general have and not the social attitudes that the wife of a fisherman would have or the wife of a man who operates a machine in a factory.

The Court: And that a woman who is married to a man who works by the day would have the same economic attitude and social attitude as her husband who works by the day, is that correct?

The Witness: By and large, yes. I can establish that.

The Court: You can establish that?

The Witness: Yes.

The Court: Well, I think the Supreme Court held otherwise in the Thiel case.

In any event, we will adjourn until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same date.)

Los Angeles, California, February 20, 1947,

2:00 o'Clock P.M.

The Court: Ex parte matters?

The Clerk: I believe not, your Honor.

The Court: United States v Local 36. Usual stipulation?

Mr. Margolis: Usual stipulation.

Mr. Calverley: Yes, your Honor.

(Testimony of William S. Robinson.)

The Court: Mr. Robinson was on the stand.

While he is resuming the stand, I will state that my remarks that the Supreme Court had made a certain holding, I think it would be more correct to say that it seems to me that it made that holding, or I would like to have counsel argue the point at the appropriate time.

On the matter of the number of precincts, those are matters of which the Court can take judicial notice. I thought for the sake of accuracy that I should have those figures. The total number of precincts in Los Angeles County is 5,894. The total registration on December 27th was 1,277,418, after dropping those who had not voted at the primary or the general election, the previous figure having been 1,861,145, or a total of 583,627 which were dropped for non-voting.

The coming April 1st population estimate, made by the Regional Planning Committee of the [377] County, is 3,747,962. They say that is based on the population census figures as they are taken from time to time, plus building permits which are taken out throughout the whole county for residential purposes. Those figures are in the record for whatever purpose you wish.

I do not know what percentage of the population in this county ordinarily is under 21, that is to say, would be disqualified from voting. Perhaps Dr. Robinson has those figures.

WILLIAM S. ROBINSON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

The Witness: No, I don't have them.

Mr. Margolis: I think those figures can be obtained at least from the 1940 census figures, because we do have it.

The Court: I suppose the pattern would be the same; it would be a mere extrapolation of that known factor in the 1940 census, a certain percentage of that, which should give the approximate eligible population for this county.

Mr. Margolis: I should think so. Of course, there will be such other questions such as citizenship, and so forth.

The Court: Those are questions of disqualification, but I mean eligibility and exemption, and so forth.

Mr. Margolis: I might also say, while we are on the question of judicial notice, we are of [378] course proceeding on the basis that your Honor will take judicial notice of the census figures and the census records.

The Court: Most assuredly.

Proceed.

Direct Examination

(Continued)

By Mr. Margolis:

Q. Now, Dr. Robinson, I think in the last question, if I recall correctly, you were asked with re-

(Testimony of William S. Robinson.)

spect to the separation of housewives and retired persons from those who were employed, and I don't remember whether you had finished your answer on the reason for the separation and what was done with regard to, first of all, considering them separately and, second, considering them with those who were employed. Do you recall if you had finished your answer?

A. I might summarize it.

The housewives and retired were separated because they are not now employed; that is, they have no occupational classification, so that results are computed separately in what follows for employed members of the panel or the jury as the case may be, and then for the total, that is, with the housewives and retired added in.

I explained that I had directed that housewives be classified in the occupation of their husbands because of the well-known correlation between the attitudes of husbands and wives; and the retired were classified simply by their last occupation before they retired. [379]

However, it makes no difference. The results are about the same whether we deal with either the employed or the total group.

The Court: The employed or the what?

The Witness: Or the total group, consisting of employed, housewives and retired.

Mr. Margolis: Let's see if the record is entirely clear on that.

(Testimony of William S. Robinson.)

Q. You found that the results were the same whether you considered only those members of the panel or of the jury, as the case may be, who were employed, or if you considered all of them together, considering housewives according to the employment of their husbands, and retired persons according to their last employment prior to retirement?

A. That is right.

The Court: What result would be the same?

Mr. Margolis: The statistical results which we are going to introduce as the result of these exhibits. We can't do it all at once.

The Court: I understand. The results we are going to get to pretty soon?

The Witness: That is right.

Q. (By Mr. Margolis): On each of these summaries, the first of which has been marked [380] W-2, there appear four columns. I wonder if you would in each instance tell the Court what it is intended to indicate.

A. The first column is numbered "Employed as."

The Court: Are there copies that I can follow you with?

Mr. Margolis: Yes, your Honor. Here is a complete set.

The Witness: I am beginning now with Set 1, "Summary of Occupations of February 1946 Grand Jurors According to Classification as to 1940 Census."

The Court: All right.

(Testimony of William S. Robinson.)

The Witness: The first column, which is headed "Number Employed as," gives for that group of February 1946 grand jurors the numbers of persons who were employed in the occupations at the left of the table.

On page 2, for example, there was one person employed either as a farmer or a farm manager.

The Court: On page 1 there is one dentist, wife.

The Witness: Yes, but not employed. I am beginning with the first column.

The Court: Housewives whose husbands—you are dealing with the first column now?

The Witness: Yes.

The Court: I see. Farmer or farm manager?

The Witness: That is right.

The Court: You don't know whether he runs a big farm or a little farm? [381]

The Witness: I haven't the slightest idea.

The Court: You don't know whether he does his own work or not?

The Witness: That is right.

The Court: You don't know whether he might work by the day for some other farmer?

The Witness: We know he is not a laborer.

The Court: That is, he is not classified as a laborer under the census table.

The Witness: If he works for another farmer, he would be so classified, as a laborer.

Mr. Margolis: There is a separate census classification for farm labor.

(Testimony of William S. Robinson.)

The Court: I know there is for farm labor, but I think it is a matter of which the Court can take judicial notice, as a matter of common knowledge, that a lot of farmers run their own farms and they work for adjoining farmers as day laborers.

All right. Go ahead. There is one farmer or farm manager.

The Witness: Yes.

Q. (By Mr. Margolis): Let's take that situation, Dr. Robinson. In that situation the farmer would be classified according to his principal occupation?

A. Yes. [382]

Q. Such as owning his own farm and running it, or whether he was a day laborer?

A. According to his principal occupation.

Q. Go ahead.

A. The second column is for housewives whose husbands are employed in the categories given at the left of the table. For example, on page 1 we find one housewife whose husband is a dentist.

Q. All of those references, for the sake of the record, are as to W-2 for identification?

A. Yes.

The third column is for retired persons whose former employment was one of the categories given at the left of the page, and the first one we find is on page——

The Court: Well, continuing on No. 1, you find one dentist, wife, and a physician and surgeon's wife.

(Testimony of William S. Robinson.)

The Witness: That is right. For the retired, the first entry I can find is on page—I can find none through page 5—there are apparently no retired persons in this group.

Q. (By Mr. Margolis): There are, however, on some of the other summaries, is that correct?

A. Yes.

The total column is simply the sum of any figure in the columns to the left of it in the same row. For example, the total of 1 in the first page means there is one person either employed as a dentist or a housewife whose husband is employed as a dentist or a retired dentist. [384]

The Court: I understand. Go ahead.

Q. (By Mr. Margolis): Now, we have marked as W-1 for identification some yellow sheets bearing at the upper left-hand corner, or, rather, the upper right-hand corner, the words “Federal Grand Jury February 1946”—I am sorry I don’t have any extra copies of these—will you explain what these are?

A. These are the original worksheets from which the typewritten sheets were made. They are the same as the typewritten sheets except that the name of the individual is given and the source of the information as to occupation is given, under either Jury Commissioner’s records, city directory, voters’ register or phone information. That is the only difference.

Then finally the class to which that person is applied is given on the right-hand column. It is a worksheet from which the typed sheets were made.

(Testimony of William S. Robinson.)

Q. In other words, it has a number of columns, the first column to the left being the name of the individuals?

A. That is right.

Q. The second column the Jury Commissioner's record, and that is the information from the Jury Commissioner's record? [384]

A. That is right.

Q. In any cases where it is blank, it is intended to indicate that there is no information?

A. That is right.

Q. The third column being the city directory, indicating information from that source?

A. That is right.

Q. The fourth column voters' register, indicating information from that source?

A. Yes.

Q. And the fifth column phone information, indicating information from that source?

A. That is right.

Q. And the sixth and last column is the class applied, being the final result which is transferred onto W-2?

A. That is right.

Q. And to other summaries similar to W-2?

A. That is right. These are the connection between the questionnaires and the summary report.

Q. At the last page of W-2 for identification we find down a little past the center of the page an item called "Grand Totals," followed by "Professional and Semi-Professional Workers," "Farmers

(Testimony of William S. Robinson.)

and Farm Managers," etc. Will you explain, first of all, what that column to the left of those headings indicates? [385]

A. Yes. The grand totals simply refer to the broad occupational classifications which are composed of the individual occupations listed on the previous pages.

For example, they are the captions. On page 1 of W-2 there is the caption "Professional and Semi-Professional Workers," and then there is a detailed statement of what that consists of.

Q. Then on page 2 there is a sub-total, is there not?

A. Yes, the total of professional and semi-professional workers in each of the four columns. Those totals are what appear on the last page under the figures corresponding to the grand total captions.

Q. With the same four columns that are executed throughout?

A. Exactly.

Q. Indicating the same thing?

A. The second column, professional and semi-professional workers, there are two individuals on the second page, and those are re-copied in the second column, first entry, on the supplementary statement.

Q. Then down at the bottom the very last item, as far as figures are concerned, you have a row of figures which appear to be totals for each column, is that correct?

A. That is correct.

(Testimony of William S. Robinson.)

Q. Now, I notice that as to the first and [386] fourth columns on Defendants' Exhibit W-2 for identification, the last page, the portion we are speaking of, there are some figures in ink in brackets, for example, opposite the figure under the column "Employed as," opposite the figure "Professional and Semi-Professional Workers," there is, first of all, in typewriting the figure 0, and then in brackets the figure (1.6).

Then in the second row, "Farmers and Farm Managers," there is 1 in typewriting and then in brackets (.2). Will you explain what those figures mean?

The Court: .2? It is .1 in mine—oh, in the fourth column. Well, it is different because the professional and semi-professional workers as under the total is a typewritten 2, and then in parentheses (2.5).

The Witness: That is correct.

Mr. Margolis: That is the fourth column. I am talking about the first column.

The Court: It says "Professional and Semi-Professional 0 (1.7)." You said 1.6.

The Witness: One of these was re-computed with a slide rule. However, the figures are about the same.

Q. (By Mr. Margolis): Will you explain what these figures in ink are intended to indicate and how they were computed?

A. The figures in ink give the number of persons who would be in that class if the different [387]

(Testimony of William S. Robinson.)

occupational levels were represented as they are represented in the population of the total labor force.

The Court: On the basis of the 1940 census figures?

The Witness: That is right.

Q. (By Mr. Margolis): Which are the last available census figures, is that correct?

A. That is correct.

Q. As to occupation?

A. That is correct.

Q. Let me interpolate here: Do you believe that the 1940 census figures can be used with a scientific degree of accuracy as applied to this situation?

A. Yes. There are undoubtedly changes in the numbers in different occupations, but the proportions of persons in the different occupations will remain relatively constant over a period of years.

The Court: That isn't true as to race, is it? According to some figures released here—I mean the census figures show, I think, 77,000 Negroes in 1940, and there was an estimate of—I don't know, maybe the Haynes Foundation or somebody else showed various figures from 133,000 to 255,000 Negroes.

The Witness: That is number of Negroes, not proportion of Negroes in the total population.

The Court: That is not the proportion, then, to the total population? [388]

The Witness: That is right. The population, if the population doubles you would expect twice as many Negroes even, with a same percentage of the total population.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): However, it is possible to have greater increases in certain groups?

A. Oh, yes. But over broad categories of these sorts these increases ordinarily average out pretty well.

Q. Let me ask you this question: If those figures are biased, the 1940 figures are biased, in the scientific sense that you have been using the word "biased," in what way would you believe them to be biased?

A. Well, they would be biased in over-emphasizing and showing to be more important today than they actually are, professional and semi-professional workers and proprietors, managers and officials. They will tend to under-estimate craftsmen and operatives in the main.

Q. Therefore, from the standpoint of the results which you arrived at, and which you will refer to later, would you say that the use of the 1940 census could be misleading?

A. Not possibly. It could mislead only by being too conservative in showing the differences of distribution which appear. The actual differences would be expected to be larger.

Q. Now, going back to this, I wonder if [389] you would tell us how these figures in ink in Column 1 were computed, the mathematical method that was followed?

A. Yes. The procedure was simply this: In the total labor force, to determine the percentage of the total labor force in any given occupational

(Testimony of William S. Robinson.)

group; then on the basis of total number of persons to be distributed, here 15, you compute what that percentage would be of the 15 and write the next to the observed number of persons in that occupational group.

Q. In other words, let us put it this way: If professional workers constituted 10 per cent of the total population in Los Angeles County, then the figures opposite the professionals would be 1.5?

A. Ten per cent of 15.

Q. So the figure 1.6 indicates that professionals and semi-professional workers constitute slightly more than 10 per cent of the total population in Los Angeles County.

A. Yes. To be exact, 11 per cent.

The Court: Counsel, I do not think any of this is material unless you can connect it up with the so-called master box or available box.

Mr. Margolis: Let me ask a few questions which will lay the foundation for the theory which I have.

Q. Assume, Doctor, that you drew simply at random from a list of 25,000— [390]

The Court: Your random or his random? Let us get that straight now.

Q. (By Mr. Margolis): Suppose there was selected without any bias a list from a group of 25,000 or 30,000 cards—let's say 500 cards—those 500 names on those cards were put into a box and the names were mixed up, and then out of that 500, 100 names were selected, and this was done repeatedly over a period of time so that you would say a sam-

(Testimony of William S. Robinson.)

pling of 100 selected from 500 and another sampling of 50 selected from the 500, another sampling of 75 selected from the 500, as a statistical matter are there certain probabilities that the 50, the 75 and the 100 selected from this box, simply blindly selected from the box without any possibility of making any choice as to what the selection shall be, would generally show the same composition as the original 25,000 or 30,000 cards?

A. That is right.

Q. It would? A. Yes.

Q. Is that a scientific matter, Dr. Robinson?

A. Yes.

Q. That can be scientifically stated?

A. That is right.

The Court: Now, Doctor, did you check with the number of persons who were excused by [391] the court here, taking into consideration those who answered the questionnaires and said that they were workers in any of these classifications that are not professional or managerial?

The Witness: Those were checked and we have some later figures on that.

The Court: You have some later figures on those? The Witness: Yes.

The Court: To show what percentage they were and the number of persons who would have been drawn?

The Witness: And how they were distributed, as far as that goes.

The Court: In other words, if the court hadn't

(Testimony of William S. Robinson.)

exercised its discretion in excusing them, can you say how many of these people would have been on this?

The Witness: I can say that the results would have been just about the same.

The Court: About the same?

The Witness: Yes, and the order of the probabilities makes it immaterial whether it is about the same or not.

The Court: I am afraid you are going to have to let me from now on, Doctor, decide what is material and what is immaterial in this inquiry.

The Witness: I am sorry.

Q. (By Mr. Margolis): In any event, we will show by other exhibits those factors that have been taken into consideration? [392]

A. That is right.

Q. There are exhibits covering that matter?

A. That is right. I meant really that you can show mathematically that the probabilities will be about the same, just about the same size, if you do take them into account. That is what I meant by saying they were irrelevant.

Q. You were talking about statistically irrelevant?

A. That is right.

Q. Now, directing your attention to the last column on the right, there are a series of figures in typewritten figures, followed by a series of figures in ink in brackets. If I were to ask you the same questions about those figures in ink as I asked with respect to the first column, would your answers be the same?

(Testimony of William S. Robinson.)

A. That is right, except for the 23 instead of the 15 for the totals.

Q. In other words, your percentage of the population, if your percentage of the population was 10 percent, then the result would be 2.3 instead of 1.5?

A. That is right.

Q. Because the total is 23 instead of 15?

A. That is right.

Q. There are other exhibits which have been prepared with similar sets of figures? [393]

A. Yes.

Q. Was the same method used with regard to all of them? A. Yes.

The Court: Well, now, Doctor, scientifically your conclusion and opinion is that to have this balanced, a cross-section of the community, assuming that legally a cross-section of the community would encompass only those classifications of occupations that are used in the census figure and which you have used here, you would have had 2.5, that is, 2½ professional and semi-professional workers?

The Witness: That is correct.

The Court: And you would have had .2, or 2/10ths, of a farmer?

The Witness: That is right.

The Court: And 2.7 of a proprietor, manager and official?

The Witness: That is correct.

The Court: Now, down here you have "no information, .1," which is 1/10th of a person, is that right? The Witness: That is right.

(Testimony of William S. Robinson.)

The Court: Now, how would you come to reconcile that so that you could get 23 people out of it, scientifically and still keep it balanced?

Mr. Margolis: That is my next question, your Honor. I anticipated it. [394]

The Witness: I might point out that there is a distinction between, let us say, a conversation and numbers of cases. You cannot find a family, for example, in which there are 3.3 children, but the fact that in a given state——

The Court: You might take into consideration that as a legal proposition a child is in existence when it is conceived.

The Witness: All right. You might. But there is still a meaning to the fact that the average size of the family, let's say, in a given state is 3.3 persons. These numbers are not supposed to describe individuals. The observed numbers naturally are digits. They are the results that count, because they are based upon observations.

The numbers which are written in ink involve fractions, simply because they are based upon a percentage.

The Court: I understand that, and I understand it quite well, but what I am trying to get at is, courts and clerks and people who administer the law are charged with getting an impartial jury from a cross-section of the community. You say to have a complete cross-section you have to have 2.5 of this, .2 of this, and so forth, but you can only have 23 people.

(Testimony of William S. Robinson.)

Mr. Margolis: If your Honor please, I intend to cover that by my next question, and I want to say that it is not our contention that this would be a representative cross-section jury. This is a method of arriving at one.

The Court: I quite understand that. [395]

Mr. Margolis: This is a method to arrive at to what extent, if at all, this jury departs from a representative cross-section jury, and if your Honor would permit me to ask a few more questions, it will lead up precisely to the answer your Honor wants. We have that in mind.

The Court: Unless this witness can offer something. All his testimony so far is a mere scientific jargon which contributes nothing whatever to the solution of the problem which we are trying to get at here.

Mr. Margolis: Your Honor, I think that the term "scientific jargon" is very unfair in view of the——

The Court: I say unless——

Mr. Margolis: If you will give us an opportunity to develop this.

The Court: Unless it is. When I refer to "jargon," I do not mean to be disrespectful any more than I do when I refer to "legal jargon." In other words, legal jargon has nothing to do with horses running, and it could be referred to that in connection with horse racing.

Mr. Margolis: If your Honor please, we intend to develop the scientific basis for this. My sugges-

(Testimony of William S. Robinson.)

tion, very respectfully, was that we have an opportunity to ask a few more questions.

The Court: If you expect to come to that point and relate it, you go ahead and we will defer this question. [396]

Q. (By Mr. Margolis): Is it possible, scientifically, having a knowledge as to the composition of the population and having knowledge as to the number of persons to be drawn from that population, to determine the reasonable variation as to the types of persons that would be obtained if the persons were obtained at random and without bias from a cross-section of the population?

The Court: Will you read that question?

(The question referred to was read by the reporter, as set forth above.)

The Witness: It is.

Mr. Margolis: Is that question clear?

The Court: No, it isn't clear.

Mr. Margolis: All right.

Q. Perhaps you can explain in your own language just what it is that can be determined, Doctor.

A. I can try.

Let's take a given class of people, say professional and semi-professional people. If there are 10 per cent of those in the population and if you draw a sample, let's say a certain number of cases from that population, at random without bias, there will not be exactly ordinarily 10 per cent of professional and semi-professional workers in that sam-

(Testimony of William S. Robinson.)

ple. In other words, in the total population there is exactly 10 per cent, but in a sample there may be 9 per cent, or there may be 9.5 per cent, or [397] 10.5 per cent. And if you take repeated samples from the same population those percentages of professional workers will vary somewhat one from the other.

Q. Even though they are selected purely in the best scientific way, is that right? A. Yes.

Q. Go ahead.

A. It is possible, if you select at random and know that you select them randomly, to estimate the range within which that percentage in the sample will vary from sample to sample to sample. That was what I meant when I answered the question "yes."

It is possible, if you know percentages of the different occupational groups in the total population, to know the size of the sample that is being taken, to set limits within which the variation for any one of those percentages will lie for samples.

You might make a statement of this sort, for example, that if the percentage of professional and semi-professional workers in the population is 10, that in samples of 100 individuals from that population—and this is only an example and not the exact figure—the percentage in the sample will lie between, let's say, 9.2 per cent and 10.8 per cent.

The Court: Or maybe more.

The Witness: No, those are limits that I am giving you. They can be computed definitely. [398]

(Testimony of William S. Robinson.)

The Court: Is that from your experience?

The Witness: No, from mathematics.

The Court: From mathematics?

The Witness: That is right.

The Court: And not your experience?

The Witness: That is right.

The Court: They wouldn't vary above or below that?

The Witness: You can set your limits as you like so that a certain proportion of your samples will vary above or below, but you can set the proportion.

The statement you make is of this sort: 95 per cent of all such samples from this population will have percentages of professional workers falling between 9.2 and 10.8 per cent. And then if you set up a population of that sort and carry out an experiment you will find that percentage verified.

The Court: That is, it doesn't vary in different sections of the country?

The Witness: No, it does not.

The Court: Is it the same in Georgia as it is in California?

The Witness: Quite so, and whether it is performed by a Negro, Jew or a white man, or any time of the year or in any season or in any condition of the weather. As long as a sample is taken with random sampling numbers. [399]

Q. (By Mr. Margolis): Now, Doctor, is it also possible to tell, once you have the figures that we are talking about, what the possibility of any given

(Testimony of William S. Robinson.)

result is if a random sampling method or an unbiased method is used? A. It is.

Q. And is it possible for you to describe simply the mathematical process through which that result is obtained?

A. The arithmetic process is easy to describe. That is computing. The mathematical process, the respective samples as mathematics goes is not easy to describe, but I think I can give you a rough idea of the sort of reasoning involved by using another kind, by using an analogy, or a simple illustration.

Let's say you have a large drum of some sort and you have it filled with black and white marbles, and that you put in, let's say, a vary large number of marbles, and that 10 per cent of them are white and 90 per cent of them are black, so you have a large drum or population, let's say, consisting of 100,000 or 200,000 or 300,000 marbles, of which 10 per cent are white.

You stir that drum very thoroughly with a paddle or shovel, or something else, you stir it very thoroughly, then you pick out, let's say, a sample of 50 marbles without regard to their color. You lead a blind-folded person up and have him pick one after the other. You can then observe the [400] proportion or percentage of white balls in your percentage of 50 cases. It will not be exactly 10 per cent, maybe 12 per cent, it can't be 11, it can be 12 or 14 or 16 per cent, or it can be 8 or 6 or 4 or 10 per cent. If you take repeated samples of that sort, throwing them back before you take an-

(Testimony of William S. Robinson.)

other so you keep the composition of the drum 10 per cent, those sample percentages will vary one from the other.

The Court: Those marbles would all have to be the same size?

The Witness: As physically similar as possible.

The Court: But people are not, though.

The Witness: No, but random numbers are.

The Court: Random numbers are?

The Witness: That is right. And the reason you use random numbers is that you associate people with numbers so that you can't be bias in selecting.

All right. Now, from an empirical standpoint, without any mathematics or theory of probability, let's assume you had taken samples of 50 one hundred thousand times. You wouldn't have observed—and these are not exact numbers—that all of those 100,000 samples, that the proportion of white balls in them would range from 2 per cent to, let's say, 18 per cent. In taking samples of 50 from a population in which there are 10 per cent white balls you never in 100,000 samples get a percentage [401] of white balls less than 2 per cent, you never in 100,000 samples get a percentage of white balls greater than 18 per cent.

Now, suppose someone leads you up to a drum which composition is unknown—

The Court: Wait a moment. That gives a variation from 2 per cent to 18 per cent.

The Witness: That is right.

(Testimony of William S. Robinson.)

The Court: That is different, then, than your 8.2 per cent.

The Witness: Those numbers are illustrative. I haven't computed them at all. I am saying you can set numbers like that and what their exact values are we don't need to worry about.

Let's suppose you have this fact stored in your memory. It is based upon an experiment, to be sure. I have it in my memory, but it is based on mathematic derivation, but they are both knowledge, let's say.

Now, someone leads you to a new drum and you don't know its composition, you don't know what percentage of the balls is white and what percentage are black, but some are white and some are black. He allows you to stir the drum very thoroughly and then he allows you blind-folded to pick out marbles from that drum. You pick out 50 per cent and you find that 72 per cent of the marbles are white. Would you believe that you had a sample of marbles from the first drum in which there are 10 per cent white? [402]

The Court: I am not answering questions.

The Witness: Well, you have observed that when you pick marbles from a drum where 10 per cent of them are white, the limiting percentages which you get for white marbles in samples of 50 are between 2 and 18. If then you go up to a drum of unknown composition—well, let me add another step.

(Testimony of William S. Robinson.)

If you then performed a similar experiment from drum with 20 per cent white marbles, you would find, let us say, that the percentage of white marbles in samples of 50 lay between 12 and 28, and if you perform it from a drum in which there were 30 per cent white marbles, you would find the percentage laying always 8 down and 8 up, between 22 and 38.

In other words, you found that whenever you picked a sample of 50 cases from a large drum in which there was a given percentage of marbles that were white, the percentage of white marbles in the sample always lay within plus or minus 8 of the percentage of white marbles in the drum.

Now, what is your inference if you get from an unknown drum 72 per cent white marbles in a sample of 50? It is simply that in that drum, what? Well, the percentage of white marbles is somewhere around 72, and it is not very likely more than 8 units from 72 in either direction, at least it is not 8 or 7 or 5 or 4 per cent.

Well, that is a very simple example of the [403] kind of reasoning that underlies the mathematics by which the probability of getting samples with so many persons of different occupational levels was computed on the assumption that these were samples from a cross-section of the total labor force.

The Court: Before you would undertake, however, in that one experiment where you would use 72 white marbles, you wouldn't want to say that that was 72 per cent unless you had previously con-

(Testimony of William S. Robinson.)

ducted the experiments with the 10 per cent and 20 per cent so that you had some information or knowledge how they would run?

The Witness: That is right.

I might add that the way formulas of this sort are devised is that they are devised mathematically. It is pure mathematics. Before they are ever used by any statistician they are tested empirically by what is called experimental samples so they are verified experimentally, say with 100,000 or 1 million samples, before they are ever applied to observations.

Q. (By Mr. Margolis): Would it make any difference whether they are marbles or squares?

A. Or human beings or automobiles.

Q. Or anything else? A. None whatever.

The Court: The percentages have to be the same? [404]

The Witness: Yes. That is the only relevant matter.

The Court: They would have to be the same size and weight, and so forth, so that the heavier marbles wouldn't be at the bottom?

The Witness: If you picked them by hand, but ordinarily we pick them by random numbers, so even physical differences between the observations make no difference.

The Court: Was the random number method the method used in the draft numbers?

The Witness: No, and the draft numbers were not randomly ordered. I am not sure whether that

(Testimony of William S. Robinson.)

has been a matter of court decisions or not, but it has been decided by a number of very prominent mathematicians in a number of universities in the United States. It was impossible apparently to stir the contents of the fish bowl sufficiently to distribute the names at random.

The Court: There were numbers in the fish bowl.

The Witness: There were numbers in capsules.

The Court: Yes. The point is, if you were going to do that by random you would use random numbers in there, is that it?

The Witness: No, I would know it or—let's say—if you want to know, if you look at your table of random numbers I can show you.

The Court: Well, I was going to get around sooner or later to asking just how you would [405] go about picking 23 people out of more than 3 million and have them divided between a fair cross-section of this community so that they would be representative approximately in these numbers that you have put in column 4 on your Exhibit W-2.

The Witness: I will wait until you ask me that question.

The Court: Are you at that point in your examination?

Mr. Margolis: I have no objection to that question being answered at this time. It is a little out of order, I think.

The Court: Go ahead. I am getting everything out of order here, I guess, in the presentation of this matter.

(Testimony of William S. Robinson.)

The Witness: It will require considerably more explanation, and I think it will be necessary a little later on.

The Court: All right.

Q. (By Mr. Margolis): Now, have you taken the figures on W-2 in the first column on the last page and computed the probability of that kind of a selection being made without bias from a cross-section of the population of Los Angeles County?

A. I have.

Q. What was your result?

A. Well, if you were to draw 1 million such samples without bias, two of them would be as out of line as this sample is.

Q. In other words, it would happen once in 500,000 times? A. That is right [406]

The Court: That might be the first time, too, might it not? The Witness: It might.

Q. (By Mr. Margolis): But the odds would be 500,000 to 1 against it being the first time?

A. That is correct.

The Court: How could it come 500,000 to 1?

The Witness: You would have to assume that that would be the last time, if the odds are 500,000 to 1. Excuse me.

Mr. Margolis: Do you want to answer that question?

The Witness: Yes, I should like to answer that question.

The odds are 500,000 to 1 because of all the trials which might come up there are only two out of a

(Testimony of William S. Robinson.)

million which would be as bad as this. That is, odds refer to repeatedly doing something. Even if something happens the first time, you do it. The odds in doing it may be very slight. That is, some horse wins the Kentucky Derby every year. The chance that any given horse before the race will win it is very small. In fact, as I remember the estimated computations on that—some mathematicians like to play with figures of that sort—as I remember, the largest chance that any single horse would win the Kentucky Derby would be something like 2 out of 10 chances, and yet some horse always does win it.

The odds really refer only to repeatedly doing something and have meaning only in terms of doing it over and over again.

The Court: But it still might happen the first time.

The Witness: It still might happen the first time.

Q. (By Mr. Margolis): Now, there are certain odds on this first particular situation, there are certain odds against obtaining a royal flush, isn't that right? A. That is right.

Q. Now, if somebody obtained that once, that is certainly within the realm of probability and it has happened lots of times?

A. That is right.

Q. Suppose somebody got a royal flush twice in a row?

A. That happens much less frequently.

Q. What would be the difference between the two?

(Testimony of William S. Robinson.)

A. Well, the chance would be just the square of the possibility the first time.

Q. And by the time that you get four or five royal flushes in a row, you might begin to suspect that something was wrong, is that right?

A. That is right.

The Court: Well, in an impartial grand jury selected from a cross-section of the community, it should, in that instance, I should think, include gamblers who are used to playing cards. [408]

The Witness: I might add that the chances here are immeasurably smaller than the chances of getting a royal flush.

Q. (By Mr. Margolis): In other words, the chance to get a royal flush more than once in 500,000 times? A. Yes.

Q. Now, turn to the column on the right-hand side of the last page of Exhibit W-2 for identification. Have you computed the probabilities there?

A. I have.

Q. What result did you get?

A. The probability was so small that to compute its exact value required a lengthy computing which I performed on other figures, of comparable figures to go with it. I can merely say that it is less than one chance in 1 million, and roughly one chance in 100 million.

Q. Now, I notice immediately below that right-hand column——

The Court: You mean to say that out of 100 million times there would only be once that the

(Testimony of William S. Robinson.)

grand jury of 23 people in a county this size would be composed of the composition that you have indicated on the last page in the total here, column 4?

The Witness: That is correct [409]

The Court: Once in 100 million times?

The Witness: That is right. But I should like to point out that it is not correct to take both of these columns as together constituting independent bits of information.

The Court: Did you take into consideration there the total population?

The Witness: Yes. What I am trying to explain to you, though, is the fact that the probability is very small in column 1 which makes it small in column 4, so that these are not two independent things. You see what I mean? That is, most of the people who are in column 4 are also in column 1.

The Court: I understand.

The Witness: Therefore the whole page should be considered as just one case. The two instances here are depending on whether you want to consider only the employed members of that jury or all members of it. That is all. The conclusion is the same in the two cases.

Mr. Margolis: I would like to call your Honor's attention to the fact that that total result shows two professional and semi-professional, two farmers and farm managers, fourteen proprietors, managers and officials, five clerical, sales and kindred workers, no craftsmen, no operatives and kindred workers, no domestic service workers, no protective

(Testimony of William S. Robinson.)

service workers, no service workers except domestic and protective workers, no laborers, and no one no information. [410]

The Court: You checked them to see if any of those were excused, did you, or you don't have the questionnaires on those, so you can't tell?

Mr. Margolis: Our other exhibits will show all of these things. Before we are finished, we will have the excused and every type of sample.

The Court: I thought the testimony was that the questionnaires are not available for the 1946 grand jury.

Mr. Margolis: We had the cards for the balance of the panel and we have an exhibit on it.

The Court: Very well. And you did get the information as to what their occupation was?

The Witness: That is right, except for those cases listed as unknown.

Q. (By Mr. Margolis): Now, I notice down in the lower right-hand corner of this Exhibit W-2 for identification there are a number of figures. Are those part of your computation?

A. Those are the results, let's say, of my computation.

Q. Will you explain what they are?

A. Yes. The P is the probability of getting such a bad result as is observed here, and the statement there, if you can read my handwriting, is that that is less than .000001, which is one in a million.

The Court: That isn't here. You have X2 equals 39, 10 equals 3, P equals .5144. [411]

(Testimony of William S. Robinson.)

The Witness: That says the same thing.

The Court: I see.

The Witness: We will come to it in a moment. The X^2 is actually χ , the Greek letter Chi, squared. It is a statistical measure of a discrepancy between a sample distribution into any kind of classes and the corresponding distribution for a population.

We will say it is a statistics invented by Carl Pearson in 1898, a thoroughly accredited statistician, and given in all statistical tests for the specific purpose of testing coincidence and agreement or lack of agreement between a sample distribution into classes and population distribution.

The lower case "n" is perimeter which deals with that distribution. I just can't explain it, but it is something in which you have to enter a table. It depends on the computation.

The "P" that you have on your sheet means it is equal to .0, and then there is a superscript 5. That means that that is a shorthand way of writing five O's after a decimal point. It means that there are as many O's as there are numbers in that superscript. It means .000001. χ square equals 30. Well, χ square actually, as you can see from the above, is 39, which is a larger value, and that makes the probability less than the figure given for 30. It is my rough guess that it is roughly 1 in 100 million, but we have exact figures for those probabilities in later exhibits. [412]

Mr. Margolis: At this time, your Honor, I offer Exhibits W-1 and W-2, which are the worksheets

(Testimony of William S. Robinson.)

as described and the summary of occupations of February 1946 grand jurors according to classifications utilizing the 1940 census, into evidence.

Mr. Calverley: We object to that on the ground of lack of foundation. The witness has testified that he has not examined all of the 24,000 or 25,000 names which was the basis of this selection. We do not have here the questionnaires of the February 1946 grand jury except those who were actually selected.

A further objection is that this witness' testimony is based on hearsay. He did not do this personally, he directed it, and it is based on telephone conversations, a great deal of it, that his subordinates had with not only possibly even the prospective juror himself but whoever answered the telephone at the other end of the line.

The Court: On the matter of hearsay, I do not think that that is a sufficient ground to sustain your objection, because most expert testimony is based upon hearsay and is only opinion. It is actually hearsay itself. I do not know whether there is sufficient foundation laid to admit it or not.

However, it will be marked for identification and a ruling on it will be reserved. I am inclined to think that it is [413] not admissible on the ground that there is not sufficient foundation laid.

Mr. Margolis: Your Honor please, I would appreciate—I have this problem, which your Honor must appreciate, as a matter of proving a case—if your Honor rules now and I have an indication as

(Testimony of William S. Robinson.)

to the basis of the ruling, maybe I can supply the foundation that is lacking. On the other hand, if we wait until the conclusion and I simply rest on the assumption that perhaps your Honor will admit it, then I will be foreclosed from the opportunity to furnishing any additional foundation. I think I can furnish all the additional foundation, your Honor, which is necessary—I think no more is necessary at this time, however.

The Court: Counsel, I base my ruling on the proposition that this man has not examined the 25,000 names. It is not shown that he has ever examined any previous grand jury panel drawn in this manner—he says this is 1 in 100 million with this group of persons in a cross-section—I do not think there is sufficient foundation laid. It is an exceedingly interesting situation, but I do not think there is sufficient foundation for it.

Mr. Margolis: May I be heard on that point?

The Court: It may be that it would be material before a congressional committee—I don't think there is any doubt of that—who are considering a means to secure some uniform [414] method of selecting a jury, but in connection with this motion to dismiss this indictment on the ground that the law has not been complied with, I don't know. I have been exceedingly liberal, I think, in the matter of the whole hearing. We have conducted it more or less as an inquiry before the Court rather than restricting you to what has been indicated to be a strict matter of proof.

(Testimony of William S. Robinson.)

Mr. Margolis: May I be heard before your Honor makes up his mind?

The Court: I am not going to rule against you now, but I am not prepared to rule for you. It may be that further examination of this witness and further exhibits will develop the lack of foundation which is lacking.

I have been studying the situation in my mind. I don't know whether any of this witness' testimony is material, and at the conclusion of the hearing I may strike it all on the ground that there is not sufficient foundation. But presently I will let it in, his testimony, but withhold ruling on this.

Mr. Margolis: I would like, if your Honor would permit me, to have something to say about it because I think it would, to some extent, condition your Honor's approach to this testimony.

First of all, as far as this particular exhibit is concerned, we already have in evidence the 23 questionnaires for the February 1946 grand jury, and certainly the composition of [415] that grand jury, that is, the grand jury that returned the indictment, is material to the inquiry here, and the basis upon which it was obtained. As your Honor indicated in his statement, the manner in which the information was obtained, while being in the nature of hearsay, is the way that scientific investigations, the way that studies are made, and the type of hearsay that is admissible.

The Court: Opinion testimony is hearsay. It is one of the exceptions to the hearsay rule.

(Testimony of William S. Robinson.)

Mr. Margolis: That is right. So at least this part, to begin with, of the exhibit which shows the occupations of the 23 jurors whose cards are already in evidence, at least that part, it seems to me, is, even under your Honor's view at the present time, admissible.

Now, as to the second part, as to the question of the reliability of the estimate, we have this witness' testimony, who I believe your Honor will concede has qualified as an expert in this field, he is considered as an expert on a national basis, that if you took these at random, as has been testified, from 25,000 or 30,000 cards, and made other random selections and added to that, that you would get the same overall result as you would if you had made the original choices from a cross-section.

In other words, that a choice from a cross-section of a small segment, let's say a choice of 23 from a segment of [416] 30,000, which itself constitutes a cross-section, will give you the same result as the choice of 23 from the original group. And there is no reason why it shouldn't give the same result, and it seems to me it is logical that if you take, say 3 million and choose 30,000 which will constitute a cross-section, and choose 23 from the 30,000, you will achieve the same results mathematically and statistically as if you had originally taken the 23 from the 3 million.

In any event, whether that is correct or not, that is the testimony here.

(Testimony of William S. Robinson.)

The Court: Not according to this witness' testimony.

The Witness: That is demonstrable mathematically.

Mr. Margolis: This witness has so testified.

The Court: I didn't so understand his testimony.

Mr. Margolis: That is what I wanted to find out.

The Court: And, moreover, as I understand this witness' testimony, he says that the only way you can have a random selection is by the random number system.

The Witness: That is not the only way, but it is the best way.

The Court: That is the best way.

The Witness: That is the easiest way.

Mr. Margolis: Your Honor, the witness has testified that the method used by the Jury Commissioner of the Superior Court was the scientific random method. That was the first thing [417] that he testified to when he was put on the stand this morning, that if you took every fifth precinct list and took every ninth name one year, and the next year every fourth list and every eighth name, that that was the sort of method that he was talking about.

The Court: Is that a random number method?

The Witness: Yes.

The Court: Well, then, what are all these tables of random numbers?

The Witness: You are pushing me into giving a lecture.

The Court: No, I am not.

(Testimony of William S. Robinson.)

The Witness: The purpose of randomness is to give you representativeness.

The Court: All right.

The Court: The purpose of randomness is to eliminate bias.

The Witness: Lack of bias is representativeness.

The Court: All right.

The Witness: There are a number of ways of doing it. If you want to take ultimately the whole population, as they do for the Superior Court, that doesn't use any randomness, but, nevertheless, is representative.

There are other ways of getting randomness. The point seems to me to be—the only point that I have seen here at least—is whether or not this is a representative sample of the population. That is all I have been telling you. And it is not. [418]

Q. (By Mr. Margolis): Are there variations as between—is there only one representative sample of 23 persons who could be selected to form a grand jury and yet be said to be a representative cross-section?

A. No, there are a very large number of them.

Q. Is there one of them? A. No.

Q. Is it anywhere near one of them?

A. No.

The Court: It is 1 in 100 million, isn't it?

The Witness: That is right. It is two of the worst in a million, let's say. It is one of the two worst that happens once in a million.

The Court: I thought you said 100 million.

The Witness: I am sorry. On the 23, my estimate was 100 million.

(Testimony of William S. Robinson.)

The Court: On the men it was 1 in a million. They weren't quite as bad unless they were polluted by the eight women, and then it is 1 in 100 million?

Mr. Margolis: Your Honor, so that the exhibit may be clear, the first column includes women, it includes employed women.

The Court: I thought it didn't.

The Witness: It is the number of persons male and female [419] employed as, and the other is housewives.

The Court: It doesn't say "number of persons male and female employed as."

Mr. Margolis: It says "Number of persons," and I think "Number of persons" includes male and female.

The Court: It says "Number employed as." Anyhow, that is straightened out. It includes men and women?

The Witness: That is right. I misspoke in the 2 out of a million, but let's say the only exact statement I have about the 23 is that the probability is less than 1 in a million. So let's leave it at that.

The Court: You testified it was 1 in a hundred million.

The Witness: I said that would be a rough guess as to what the actual figure was. I explained that to find the exact figure I would have to get an involved computation so I could only guess at it. That is as far as the tables go.

The Court: There is another thing I have in mind in connection with whether or not this is ad-

(Testimony of William S. Robinson.)

missible. Congress has provided by statute for a jury commissioner, and they have allowed him \$5 a quarter, or whatever it is—what is it, \$5?

Mr. Smith: Not over \$15 a term.

The Court: Not over \$15 a term. There are two terms in a year, so that would be not over \$30 a year. Congress makes the appropriations for the clerk's salaries and allows [420] the personnel. Now, it might be desirable to go to the voters' register—I don't know; I will say for the benefit of counsel here that from time to time since I have been on this bench I have endeavored to find a means other than the present one used for the selection of juries, and have gathered some information concerning the segregation and methods and costs—but the point I am making is that I have to admit this evidence, not only in the light of what you are trying to get at here, but also in the light of what Congress has allowed by way of personnel to perform these services.

Mr. Margolis: I would venture to disagree with that, your Honor. I would say that if Congress hadn't allowed a cent for the selection of a jury, so that there was no way of paying for anything—let's assume that the court said, "I will have to deny a jury trial because I have no means of getting a jury. I am not allowed any means of getting a jury and therefore I deny you a jury trial."

The Court: I could appoint somebody marshal and have him go down on the street and get a jury then.

(Testimony of William S. Robinson.)

Mr. Margolis: Let's assume that you have nobody to appoint as marshal and nobody would work without money. Let's assume that sort of a situation. If that hapuened, I venture to say that the denial of a jury trial would nevertheless be reversed.

Similarly, the Constitutional right to a representative [421] jury, to a jury which is selected through a system designed to secure a cross-section of the community, is a constitutional right, and the difficulties which stand in the way of getting one, under many authorities in the Supreme Court, must yield to the constitutional right.

The Court: I do not think there is any doubt about that, counsel, but I have to take into consideration the fact that this statute has been on the statute books for many years, that for a great many years juries have been selected and Congress has had a problem before it, and certainly the latitude here in the matter of the clerk going out, or the commissioner going out, and canvassing 3 million names, if that were necessary, to get a complete cross-section, or 33,000, or the 5,498 precincts in the county, is a matter that I have to take into consideration in limiting the scope of this inquiry.

Mr. Margolis: Your Honor please, on the question of what has been done, I think that there were many, many years in the Federal Courts when there were no women on the jury, yet when the question was presented as to whether or not there should be women on the jury, you know what the Supreme Court said in the Ballard case.

(Testimony of William S. Robinson.)

For many, many years there were juries without Negroes on them, where Negroes were simply kept off the juries until a series of cases ending up with *Smith v. Texas* established that. [422]

For many, many years the right of occupations of different economic sections of the community to be represented on the jury was not recognized, I concede that, but we now have the *Thiel* case.

The Court: No, I cannot agree with your last statement, that different economic classes, if there is such a thing, were refused representation on the juries.

In any event, I am not prepared to rule on it at this time, and it may be that you can develop a sufficient foundation later. I have indicated to you something of what is in my mind.

Mr. Margolis: May we have a short recess?

The Court: I think it is necessary.

(Short recess.)

The Court: Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Calverley: Yes, your Honor.

Mr. Garrett: If your Honor please, may I be excused at 4:00 o'clock to go to another court?

The Court: Surely. I am sorry I delayed you, but I had some business with another judge concerning another matter.

Proceed.

Mr. Margolis: Your Honor please, I have here some yellow sheets marked "Grand Jury Excused

(Testimony of William S. Robinson.)

1946," and a white sheet headed "Summaries of Persons on Grand Jury Panel February [423] 1946," which I will ask to be marked as the defendants' exhibit next in order.

The Court: That one is summaries of persons on grand jury panel February 1946?

Mr. Margolis: That is correct. I will ask that those be marked X-1 and X-2.

The Clerk: The yellow sheets will be X-1 and the white sheet X-2.

(The documents referred to were marked Defendants' Exhibits X-1 and X-2 for identification.)

Mr. Garrett: What are the titles of the two sections, may I ask, of that exhibit?

(Conference between defense counsel.)

Mr. Calverley: I understand, your Honor, that this is marked only for identification?

The Court: Marked only for identification; yes.

Q. (By Mr. Margolis): Now, with regard to the document which has been marked X-2 for identification, I notice that it has a number of titles on the left-hand side, professional and semi-professional workers, farm and farm managers, and so forth. Are those the same as the summary on W-2 which you referred to? A. Yes.

The Court: Same headings?

Q. (By Mr. Margolis): And also the headings are the [424] same, and they mean the same things,

(Testimony of William S. Robinson.)

and the figures generally are the same and mean the same thing? A. Yes.

The Court: And the columns?

Q. (By Mr. Margolis): And the columns and the computations were made in the same manner, is that correct? A. That is correct.

Q. Now, X-1 is labeled "Grand Jury Excused 1946." Can you tell us what that is?

A. These are the records from the cards of the grand jury panel who didn't serve as grand jury members in February 1946.

There is one card which could not be found, so that there are only 26 cases here instead of the 27 necessary to make up the total of 50.

Q. Which does not include the 23 jurors who actually served and for whom there were questionnaires, is that right?

A. No. Their individual records have already been put in.

Q. Is it true that X-2, then, constitutes a compilation of X-1, X-1 and W-1?

A. That is right.

Q. So as to give the entire grand jury panel for February 1946, both those who had served and those who were excused, with the exception of the one card which couldn't be located? [425]

A. That is right.

Q. Now, with regard to the left-hand column, "Employed as," on X-2, did you compute the possibilities with regard to that kind of a selection being made by an unbiased selection from a cross-

(Testimony of William S. Robinson.)

section of the community, computed in the same manner as referred to with regard to W-2?

A. No, I did not.

Q. Did you overlook making that one?

A. No. There is no reason to make it. I computed it for the total, for the four columns, and the probability here will be of the same size, approximately.

Q. You can tell that by examining it?

A. Yes.

Q. Approximately the same size?

A. Yes. It depends on the average size of the discrepancies between the observed and the handwritten figures, and they are about the same in the two columns. The probabilities are so small that there is no use in computing it.

Q. You mean the difference in probability?

A. Yes.

Q. Then you did compute the probability with regard to the total columns?

A. That is right.

Q. What decision did you arrive at?

A. The probability of getting a sample that far out of [426] line is considerably less than one chance in a million.

Q. You didn't compute the exact extent to which it is one chance in a million?

A. That is right, but I can guess at it as roughly 1 in 100 million again.

Q. How about the left-hand column, "Employed as," would it be about the same?

(Testimony of William S. Robinson.)

A. About the same. Probably it would be a little larger, that is, the sample would be. I suppose the probability would be 1 in 70 million.

The Court: How many?

The Witness: One in 70 million.

Mr. Margolis: At this time, your Honor, I offer Exhibits X-1 and X-2 in evidence.

Mr. Calverley: We object to that, your Honor, on the same grounds as heretofore specified.

The Court: They will be marked for identification and the ruling reserved.

Before you get away from that now, do you have those before you?

The Witness: No.

The Court: Hand both W-2 and X-2 to the witness.

On X-2 the total is seven professional and semi-professional workers, is that correct?

The Witness: That is correct. [427]

The Court: On W-2, two served. That would indicate five were excused, isn't that right?

The Witness: I haven't found the total column yet for W-2. That is correct.

The Court: Five were excused?

The Witness: Yes, sir.

The Court: Or five/sevenths of those called were excused.

The Witness: At least they didn't serve. I presume they were excused.

The Court: Well, the method is to find them excused or incompetent or disqualified by the judge.

(Testimony of William S. Robinson.)

These were called, summaries of persons on the jury panel, and the testimony was that they were called and those that did not serve were excused.

The Witness: I see what you mean.

The Court: Farmers and farm managers, there is one that served and one that was called.

The Witness: That is correct.

The Court: Proprietors, managers and officials, excepting farm, fourteen served and 21 were called.

The Witness: That is correct.

The Court: That would indicate one-third of those were excused.

The Witness: That is correct. [428]

The Court: Clerical, sales and kindred workers, it indicates eight were called and five served, or three-eighths of them were excused.

The Witness: That is correct.

The Court: Craftsmen, foremen and kindred workers, being the next heading, four were called and all four of them, or 100 per cent, were excused.

The Witness: That is correct.

The Court: Operatives and kindred workers, one was called and that one was excused.

The Witness: That is right.

The Court: Or 100 per cent.

The Witness: Yes.

The Court: Domestic workers, none were called.

You do not give any weight to that in your calculations here, do you?

The Witness: I don't understand what you mean.

(Testimony of William S. Robinson.)

The Court: Well, in your Exhibit W-2 you have the figures 2.5 as the number of persons in the category indicated who would have been called if they had been a true cross-section statistically extrapolated in the manner that you have testified to. Then in back of domestic workers on Exhibit W-2 you do not have anything.

The Witness: I do on my sheet.

The Court: There is none here. [429]

Mr. Margolis: That is an office copy. It isn't complete. It is on here.

We can just write it in on the working copy, your Honor.

The Witness: It was put in on the wrong line. The 2.4 should have been on the line above, and .4 next.

The Court: Domestic and protective, that was .0.

Well, there were no domestic workers called, no service workers except domestic and protective, no farm laborers, and then under "No information" there were seven called and only one served, or six-sevenths of them were excused.

The Witness: That is correct.

The Court: There was no way of knowing what their occupation might have been?

The Witness: No.

Mr. Margolis: I might say that the percentage of "No information" is much greater than in any others, because on the 26 there were only cards and no questionnaires. In all the other instances we had questionnaires. This is the one case where we

(Testimony of William S. Robinson.)

had to resort to sources other than the Commissioner's records in order to get the occupation.

The Court: Do I understand you to say that it would have made no difference by virtue of the fact that 100 per cent of the craftsmen, foremen and kindred workers were excused and three-eighths of the clerical, sales and kindred workers, that it made no difference in the make-up of this [430] jury, that it still would have been one chance in approximately 100 million?

The Witness: It would have been a chance far too small to have occurred by chance.

The Court: It is a chance far too small to have occurred by chance?

The Witness: That is right. It would still be an improbable selection, highly improbable selection.

The Court: Highly improbable selection?

The Witness: Yes.

The Court: That is to say, excusing all of these people?

The Witness: Yes.

Q. (By Mr. Margolis): Let's see, what is it that you mean would be highly improbable?

A. I mean in this sense, that if you would look at the total panel, that is, X-2, the distribution there is an extremely improbable selection from the total population.

Now, on the only way in which you could have gotten a representative grand jury would be to somehow adjust——

(Testimony of William S. Robinson.)

The Court: A statistically representative grand jury.

The Witness: A statistically representative grand jury, that is right—would be to somehow adjust for the unrepresentative nature by selecting to it from the biased jurors.

The Court: Statistically biased.

The Witness: That is right. In other words, by selecting [431] for rejection—by excusing, to be exact—15 of those persons from—well, how many—we only need in the grand jury or should have in the grand jury only 2.7 proprietors, managers and officials, and therefore you would have had to excuse 18 of them that were called on the panel.

Q. (By Mr. Margolis: In other words, you never had a chance from the start, is that correct?

A. That is correct.

The Court: A chance for what?

The Witness: A statistically representative grand jury.

The Court: That is no indication that the people who were finally selected were otherwise not impartial, though.

The Witness: No, nothing whatever.

Mr. Margolis: I would like to say, your Honor, that our motion does not go to that point.

The Court: That may be the law.

Mr. Margolis: At least that is not our understanding of the law, your Honor. Our understanding of the law is that it is not——

The Court: It must be impartially selected to be impartial. That is the effect of your motion.

(Testimony of William S. Robinson.)

Mr. Margolis: That we are entitled to a grand jury and to a trial jury selected from a cross-section of the population, using a method designed to achieve a statistically unbiased grand jury from that cross-section. [432]

Now, it may be that those statistics will work out in different ways under different situations, but if the method is such that it leads to a statistically biased grand jury, then both from an administrative and from a constitutional viewpoint the grand jury or the trial jury, as the case may be, have been improperly selected and may not act, or the indictment under the grand jury may not stand.

That is our view of the law, and we are prepared to argue that, of course, at the appropriate time.

Mr. Calverley: We take the opposite view and are prepared to argue that there is nothing in the law that requires that a grand jury be impartial on a statistical basis, or that it be selected on that basis at all.

Mr. Margolis: I didn't say that the final result has to be impartial on a statistical basis.

Mr. Calverley: Or be selected on any such basis.

Mr. Margolis: That, then, is where we part company.

I ask that this group of cards that I have marked "Federal Grand Jurors September 1946 Term" be marked Y-1, and "Summary of Occupations of September 1946 Grand Jury According to Classifications Utilized in 1940 Census" be marked Y-2. It

(Testimony of William S. Robinson.)

just happens that in this case our working records were kept on cards instead of on the yellow sheets.

The Court: They will be marked for identification. [433]

(The documents referred to were marked Defendants' Exhibits Y-1 and Y-2 for identification.)

Mr. Margolis: If your Honor please, I would like to suggest a method of perhaps saving some time with regard to each of these exhibits. I know that with regard to each of these exhibits the testimony as to the general form of the exhibit as to the method preparing the exhibit and as to what the letter and the letter 2 documents are respectively would be the same. I could go over each one and we could simply let the record show, or have a stipulation that the testimony would be the same without binding anybody to the truth or lack of truth of that testimony, and proceed a lot faster.

The Court: Would you want to stipulate, without waiving your objection, that if the same questions were asked this witness concerning the rest of these, which will be marked with the appropriate numbers, that he would give the same answers as he did to Exhibits W and X?

Mr. Margolis: Not the mathematical computations, but simply as to the manner of preparation and as to what the columns show. As to what the mathematical computations are, we will have separate testimony from each exhibit.

(Testimony of William S. Robinson.)

Mr. Calverley: So far as we are concerned, we have no objection to so stipulating, without prejudice to our right to move to strike the whole testimony on the ground of [434] immateriality at the appropriate time, and for lack of foundation.

The Court: Very well. Let us get the rest of them marked while we are at it.

Mr. Margolis: I will call these off, then.

I will ask that the yellow sheets headed "Federal Grand Jury Panel September 1946 Term" be marked Z-1, and that the "Summary of Occupations of September 1946 Grand Jury Panel According to Classifications Utilized in 1940 Census" be marked Z-2.

(The documents referred to were marked Defendants' Exhibits Z-1 and Z-2 for identification.)

Mr. Margolis: Next, your Honor, I will ask that the group of yellow sheets carrying no other heading than the first sheet bears the heading "Professional and Semi-Professional Workers," otherwise it doesn't appear to have a heading, however, they relate to these which I will ask to be marked AA-1, they relate to the document which I will ask to be marked AA-2, which is "Summary of Occupations of September 1946 Petit Jurors According to Classifications Utilized in 1940 Census."

(The documents referred to were marked Defendants' Exhibits AA-1 and AA-2 for identification.)

(Testimony of William S. Robinson.)

The Court: Do you have several copies of that?

Mr. Margolis: I think that is one on which there were several copies prepared. [435]

The Court: Very well.

Mr. Margolis: Next is BB. I ask that the "Summary of Occupations for all 1946 Jurors for Whom Information is Available According to Classifications Utilized in 1940 Census"—there are no yellow sheets because this is a summary of all of those preceding 1946—be marked BB.

(The document referred to was marked Defendants' Exhibit BB for identification.)

Mr. Margolis: As CC-1 I ask be marked "Federal Grand Jury February 1947 Term" and as CC-2 "Summary of Persons Federal Grand Jury February 1947."

(The documents referred to were marked Defendants' Exhibits CC-1 and CC-2 for identification.)

Mr. Margolis: As DD-1 I ask be marked the yellow sheets which are headed "Jurors Excused February 1947," and as DD-2 "Summary of Jurors February 1947 Excused."

(The documents referred to were marked Defendants' Exhibits DD-1 and DD-2 for identification.)

Mr. Margolis: Then EE-1 I ask to be marked "Petit Jury February 3, 1947"—those are the yellow sheets—and the white sheets, "Summary of Persons on Petit Jury February 1947" as EE-2.

(Testimony of William S. Robinson.)

(The documents referred to were marked Defendants' Exhibits EE-1 and EE-2 for identification.) [436]

Mr. Margolis: As FF-1 I ask be marked the yellow sheets headed "Questionnaires for Petit Jurors Summoned to Appear 2/17/47," and as FF-2 the white sheet headed "Questionnaires for Petit Jurors Summoned to Appear 2/17/47."

(The documents referred to were marked Defendants' Exhibits FF-1 and FF-2 for identification.)

Mr. Margolis: Then as GG-1 the yellow sheets "Petit Jury February 1947, Jury Term Returnable 2/3/47 Excused," and as GG-2 "Summary of Petit Jurors February 1947 Excused."

(The documents referred to were marked Defendants' Exhibits GG-1 and GG-2 for identification.)

Mr. Margolis: Then as HH-1 the yellow sheets, which are not headed but which are part of Exhibit GG-2, "Summary of Persons on the Jury not Drawn 1947."

The Court: What do you mean by "Summary of Persons on the Grand Jury not Drawn?"

Mr. Margolis: That means those remaining in the box out of the 822 names which we have. Your Honor will remember that out of the 855 names we only found questionnaires for 822, and there is an

(Testimony of William S. Robinson.)

explanation that the other 33 might have been sent in to the judge to be excused and never found their way back.

(The document referred to was marked Defendants' Exhibit HH for identification.)

Mr. Margolis: Then as II we ask be marked "Overall [437] Summary of Jury 1947." There are no yellow sheets for that because that is merely a summary of the previous 1947 exhibits.

(The document referred to was marked Defendants' Exhibit II for identification.)

Q. (By Mr. Margolis): Now, in order to save time, Dr. Robinson, will you please go through Exhibits Z through II and give us the mathematical computations of probabilities that you have computed with regard to each of those exhibits, stating with respect to each exhibit and with respect to each column, each of those mathematical computations and how it was made?

A. Z-2, which is the September 1946 grand jury panel, in the fourth column, that is, for the total including retired and housewives, the probability is 1 in 1 million of getting a distribution out of line as far as this one is. I am giving figures only to round numbers.

Q. You are not giving the exact, precise figure?

A. Well, in this way, if it is point and then 000065 I will call it zero 1 just to make it a convenient number.

In AA-2, which is the 1946 petit jurors—

(Testimony of William S. Robinson.)

Q. Could you give us the right-hand column?

A. I gave you only the right-hand column on that. I didn't compute the left-hand column at all. The discrepancies are, if any, larger in the left-hand column than in the right.

Q. All right. [438]

A. It is unquestionably a very small probability, and there was no use in computing it.

Q. All right.

A. In AA-2, which is the September 1946 petit jurors, for the left-hand column, that is, "Number Employed as," the probability of getting a distribution as bad as this one or worse is equal to a number which is .0 repeated for 68 times, and then a 1.

Q. That would be like the probability of 1 in——

A. It is a chance of 1 in a number which is the figure 1 followed by 69 0's.

Q. All right. How about the right-hand column?

A. That was the left-hand column. The right-hand column for the total, that is, including the retired and housewives, the possibility is 1 in a number which is 1 followed by 73 0's instead of 69 0's.

The Court: How would you say that?

The Witness: You would have to say in in powers of 10. The way a mathematician would state it, he would state it 1 by 1 times 10 to the minus 68 power.

Q. (By Mr. Margolis): There is no term such as billion or trillion?

A. You run out of those in the first few 0's.

(Testimony of William S. Robinson.)

I might add, whereas these numbers seem almost incredible, they do so to me. I have never seen a consistent set of [440] unprobable distribution of samples in my life.

Q. (By Mr. Margolis): All right. Go on.

A. BB, that is occupations for all 1946 jurors for which there are records, the left-hand column, which is for the number employed only, I have no computation because it is obviously a number about the same as the one for the right-hand column.

For the right-hand column the total of employed housewives and retired, the probability is equal to .0, and of the 0's there are 126, and then there is a 2. That is a probability of 2 in a number which is 1 followed by 127 0's.

Q. 2 over?

A. 2 over 1, and then 127 0's. I should say, from a rough estimate, that is approximately the probability that the judge would grow wings and fly about the courtroom in the next minute. The probability of physical science is of that size. It has been computed about that size.

CC, grand jury February 1947, I have the right-hand column only, that is, the total of employed, housewives and retired. The probability there is 2 in 1 million.

The Court: That is on the right-hand column?

The Witness: That is on the right-hand column for the total of employed, housewives and retired all together.

(Testimony of William S. Robinson.)

Mr. Margolis: I wonder if I could interrupt a moment and ask you to explain something. [440]

Q. Is there any relationship between a large sampling, between the difference in probabilities of a large sampling which is off a long way, and of a small sampling which is off a long way?

A. Yes.

Q. Will you explain that, please?

A. A small number of cases, 23 for a grand jury, may be quite wide of the population distribution, quite far off, and still not show a small probability.

Q. Still be within the limits of actual probability?

A. Yes. When you have a large number of cases the relatively smaller discrepancy will turn out to be very improbable, so that the test is lenient for grand jurors and less lenient for panels or for larger groups of cases.

Q. In some of these smaller groups where there appears to be about the same proportion, the chances will be 1 in a million, but in the larger groups the chances will be very much slighter of attaining that result, is that right?

A. That is correct.

Q. Now, will you go on, please? First of all, you didn't compute the left-hand column.

A. I said that, I think, previously.

Q. It would be about the same?

A. It would be slightly larger, but about the same. In DD, which is the grand jurors, summary

(Testimony of William S. Robinson.)

of grand jurors [441] February 1947 excused, the left-hand column I did not do. I have the probability for the right-hand column, that is, of employed, housewives and retired, and a very striking fact is that the probability there——

The Court: You mean that is the total?

The Witness: That is the total.

The Court: Including the number employed as well as the others?

The Witness: That is right. The probability there is 1 in 10.

The Court: One in 10?

The Witness: That is correct.

The Court: In other words, out of the same batch of persons of the grand jury that was drawn it was 1 in 2 million, is that right?

The Witness: Two in 1 million.

The Court: Two in 1 million?

The Witness: Two in 1 million.

The Court: And those that were excused 1 in 10?

The Witness: That is correct.

The Court: You can have variation, then?

The Witness: That is what happened.

The Court: That is what happened.

Q. (By Mr. Margolis): If you combined the two—we have not combined those two here for that purpose—but if you [442] combined the two, do you know about what the probabilities were?

A. The probability would be on the order of 1 in a million.

(Testimony of William S. Robinson.)

Q. In other words, if you took the original panel from which the grand jurors were excused and the grand jurors were selected, it would be about 1 in a million?

A. Yes.

The Court: In other words, if a person were deliberately setting about to get this classification, he would have to try it a million times before he deliberately excluded all of the other classes and got this proportion here?

The Witness: No, in fact, definitely not.

The Court: So then this does not indicate, do I understand, to you a deliberate bias on the part of the person who selected it?

The Witness: May I answer your first question first?

The Court: You have answered it already. You said no.

Mr. Margolis: I think it ought to be repeated.

The Court: That is the one that was actually selected.

Mr. Margolis: But deliberately, you say.

The Witness: One may select a very unrepresentative sample and take it just once. That is why I said no.

The Court: According to the decisions, it has to be a conscious exclusion. In this one here you said that it was [443] one chance in the figure 1 followed by 126 0's. To obtain that result deliberately a person would have to do it that many times, is that right?

(Testimony of William S. Robinson.)

The Witness: I don't understand your question, to attain the result?

The Court: To deliberately set out to attain that result.

Mr. Margolis: You mean using an unbiased random method?

The Court: Using a biased method.

The Witness: Using a biased method, I can do it once.

The Court: Using a biased method you can do it once?

The Witness: I will pick all of the business class and leave out everybody else, and there you have a sample which is even more biased than this one.

The Court: All right.

The Witness: The probabilities refer to picking without bias or randomly, and then it would take several billion trials in order to get a sample this much out of line.

Q. (By Mr. Margolis): Would you go on now, Doctor?

A. I think I was talking about the probability of 1 in 10.

The Court: That is DD-2.

The Witness: That is right.

Q. (By Mr. Margolis): How about the probability in the "Employed as?" [444]

A. It would be approximately the same. There is not much difference.

Q. How about EE?

A. EE-2, persons on petit jury February 3, 1947, there I did not do the first column since it is the

(Testimony of William S. Robinson.)

same approximately as the fourth, but for the fourth column, that is, the total of those employed, plus housewives and plus retired, the probability is very much less than 1 in 1 million, 1 in 50 or 100 million. The table only went to 1 in 1 million.

Q. You didn't make that extra computation that you made in some of the other instances?

A. No.

Q. The next one?

A. FF-2, questionnaires for petit jurors summoned to appear 2/17/47, I have only the total column again, since there are only 17 out of 180, 200 cases in the housewives and retired column, and in any case the columns are similar. For the total column consisting of the employed plus the housewives plus the retired, the probability is well less than 1 in a million again.

Q. GG-2?

A. GG-2, again only for the right-hand column, since the columns are similar, that is for the employed, plus housewives plus the retired, the probability is well less than a million, and that is a definite statement. My guess is it [445] would be 1 in roughly 50 million.

The Court: What was FF-2?

The Witness: That is about of the same. The probability is less than 1 in a million, and I estimate it as somewhere between 1 in 50 and 1 in 100 million.

Q. (By Mr. Margolis): HH-2?

A. HH-2 is for persons on the jury not drawn 1947. Again I have the right-hand column only, the

(Testimony of William S. Robinson.)

columns being similar and there being only 42 cases out of 400 in the two columns for housewives and retired. There I have no figure apparently for the X. The probability is probably very much less than 1 in 1 million again.

Q. That would be the same for the other column?

A. About the same for both columns. In fact, the probability would be almost incredibly small. It would be one of the probabilities such as I have computed before, that is, with a hundred or more 0's in it.

Q. Now we have the overall summary of the jury for 1047 where we have a sample of the 822 questionnaires.

A. There I have only the right-hand column again, since the results would be similar. There are 800 cases and only 70, or 10 per cent roughly, in the two columns for housewives and retired, and the results are so highly significant for the right-hand column that they must be for the left-hand column as well. [446]

The probability there is .0, the 0 being repeated 103 times, and then a 1, or roughly 1 over a number which is 1 followed by 104 0's. Again incredible probabilities entirely.

The Court: Now, Mr. Witness, you say that these probabilities would occur in the various times or chances that you have indicated. That is, they would occur if you used the system that was described this morning as used by the county in sending letters to registered voters.

(Testimony of William S. Robinson.)

The Witness: No, the probabilities would be more.

The Court: You calculated this on this table of random numbers?

The Witness: No. These are the probabilities which you would get—to begin with, these probabilities give you the chance of getting a sample as badly representative as the one in question, and they give you the relative frequency which, in taking random samples of the same size, you would get a sample that bad.

The Court: In other words, your opinion is then based upon the premise that on each of those occasions, had you used the random number system and applied it to the population here, it would have resulted in the 1 in a million or 1 in 100 million?

The Witness: Or who had selected the tickets out of the box, stirred the box and picked tickets, or used one of the [447] jury wheels that mixes the tickets. Those are random methods.

The Court: That is a random method?

The Witness: Quite.

The Court: They did use a box here and stirred the tickets.

The Witness: Therefore the presumption of this evidence is that if they used a random method, which they did, that the set of tickets from which they picked the sample was in no means whatever representative of the population. In other words, they did not have a cross-section in the set of cards. That is the very basis of the whole inference that

(Testimony of William S. Robinson.)

can be drawn from this, is that there was not a random procedure involved. Therefore, these cards did not represent anything approaching a cross-section of the population.

The Court: In order for you to determine whether they did not determine anything approaching a cross-section of the population, and in order for you to reach the conclusion that this would only occur once in 100 million times, you would have to make some calculation on what would have occurred if you had done it right, wouldn't you?

The Witness: That is correct.

The Court: Well, then, what method did you use in calculating it if you had done it correctly, or right, according to your theory, or statistically?

The Witness: You see, there are very many right samples [448] from a given population. A right sample is a sample which does not deviate from the population percentages by more than a certain amount all told for all classes taken together.

Mr. Margolis: In other words, deviation in samples is normal but there are limits of deviation.

The Court: I understand that.

The Witness: Now, those deviations are measured not in terms of the specific number of cases in the different classes for a sample, they are measured by computing a measure of discrepancy between sample and population distribution, and that measure is the measure I have been calling X square.

(Testimony of William S. Robinson.)

Now, that measure, which is a measure, as I can show you very readily, of discrepancies between percentage in the population and percentage in the sample for all classes combined, your mathematics gives you a value of X^2 , which is the natural value which you would get by chance, and when a value is larger than P you say something other than chance must have operated.

The Court: Then reducing this down to terms which are simple enough for me to understand, you would say that your premise was that in using the business and professional people, that you took the 1940 census percentage of them as indicated in the census, is that correct?

The Witness: That is correct. [449]

The Court: And then you said, well, if there are that many business managers, and so forth, and they drew 40 here, then they are off so much, is that correct?

The Witness: That is correct.

Q. (By Mr. Margolis): Off from reasonable probabilities?

A. Off from the average.

The Court: Statistical probabilities?

The Witness: Yes.

The Court: Either by the random method—

The Witness: Or a wheel, a jury wheel.

The Court: With all of the names in it?

The Witness: Yes.

The Court: The whole county, if they had it and were able to get that?

(Testimony of William S. Robinson.)

The Witness: Yes, or which is quite equivalent mathematically, the records or the cards or the tickets for a cross-section of that total population.

Mr. Margolis: Now, at this time, your Honor—does your Honor have some more questions?

The Court: No, not right now.

Mr. Margolis: At this time, your Honor, I want to offer in evidence Exhibits Z-2 through II individually, and in this connection I would like to point out that the questionnaires upon which Exhibits CC-2 through II are based are in evidence.

Mr. Calverley: We object to that, your Honor, on the [450] grounds heretofore stated; lack of foundation laid.

The Court: They will be marked for identification and the ruling will be reserved.

Q. (By Mr. Margolis): I have asked you to make another calculation, Doctor. Assuming the following facts—and I might state, your Honor, what the basis for my assumption is because otherwise it will doubtless be objected to, there probably will be an objection anyway—I am obtaining my facts from the case of *Smith v Texas*, 311 U. S. 128, in which the Supreme Court made the statement: “Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by undisputed evidence to possess the legal qualifications for jury service.”

Now, assume—I think I have already asked you to make this computation? A. Yes.

(Testimony of William S. Robinson.)

Q. In which you assume the following facts: A situation in which Negroes constituted 10 per cent of the population, or 10 per cent of the pool from which the drawing was to be made, whites 90 per cent, and from that pool there were nominated for grand jury service 18 Negroes and 512 white persons, and there served five Negroes and 379 white persons.

I think you have your sheets here with your calculations on it? [451]

A. I have the probability, if that is all you want. I copied that off.

Q. What are the probabilities of that sort of a result being achieved?

A. If there had been random selection with regard to color, the probabilities are 8 in 1 million of getting that few Negroes as observed.

The Court: I think this might be an appropriate time to recess.

Mr. Margolis: Very well.

The Court: How many more witnesses have you?

Mr. Margolis: This is our last witness, and I would say that I have on direct examination probably another 20 minutes to half an hour.

The Court: Barring interruptions by the Court?

Mr. Margolis: I am speaking about my examination, your Honor.

The Court: How many witnesses do you have?

Mr. Calverley: At this time, your Honor, I don't believe we will have any that I know of.

The Court: Very well. Recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Friday, February 21, 1947.) [452]

* * *

WILLIAM S. ROBINSON,

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Mr. Margolis: While the witness is taking the stand, your Honor, we have borrowed from the public library and would like to show to counsel and your Honor the volume of population census, characteristics of the population of California, [459] prepared under the supervision of Dr. Leon E. Truesdale, which we have, published in 1942 and being the 16th census of the United States, 1940. It corresponds with our information upon which the statistical data was computed, which appears at page 52 of the volume that I have indicated.

* * *

Q. (By Mr. Margolis): I want to show you the document which I have just referred to and which I have shown to counsel and to the Court, particularly page 52, and ask you whether or not those are the figures that were used in connection with the computations that you have testified about yesterday. A. Those are the figures.

Q. Now is there in Los Angeles, for Los Angeles County, an available breakdown—I will withdraw that.

(Testimony of William S. Robinson.)

I notice that in the Los Angeles County figures the breakdowns are given by major headings, that is, professional workers, craftsmen, proprietors, and so forth. A. That is correct.

Q. And not by the subheadings which were referred to [461]

The Court: It is given by the major headings, of which there are 11, is that correct?

Mr. Margolis: Well, in this case, if your Honor please, for example we have combined, because they were combined in Los Angeles city, professional workers and semi-professional workers, so there are 12 here instead of 11. But they are the same headings except that in one instance professional and semi-professional is combined and in the other instance they are separate.

The Court: Very well.

Q. (By Mr. Margolis): Now in the Los Angeles city figures, in the volume that we referred to yesterday, also for the 1940 census, there are the subheadings such as under professionals you have actors, architects, artists and art teachers, and so forth? A. Yes.

Q. What relationship, if any, is there between the subheadings in the figures for Los Angeles city and the main main headings in the figures for Los Angeles County?

A. The subheadings for Los Angeles city for any major classification is such as professional workers are identical with the subheadings not appearing for the county figures.

(Testimony of William S. Robinson.)

Q. Not appearing? What do you mean, they are identical then? [462]

A. That is, the county figures are given only by major headings, but when they were tabulated by the census, the same subheadings were used as are given for the city.

The Court: In other words, under the heading there, professional and semi-professional workers in the county, they included everything from actors to surveyors? [463]

The Witness: That is correct.

* * *

Mr. Margolis: I think it probably will not be necessary to show you the exhibit marked for identification in order to direct your attention to something I think you have in mind, Doctor.

Q. I note that on Exhibit AA-2 for identification there appear to be out of a total of—I will use the right-hand columns, the total columns for this purpose because they are so similar to the other columns—there appear to be a total of 86 businessmen, managers and officials out of a total of 188 altogether, or close to 50 per cent, slightly under 50 per cent, and out of the 86 businessmen—this is on page 3, your Honor, which is from a standpoint of headings—there appear to be 38 out of the 86 engaged in finance, insurance and real estate, or almost one-fourth of the total and almost one-half of the businessmen.

Now in making your computations of probabilities, did you take into consideration such factor as

(Testimony of William S. Robinson.)

the large number of finance, insurance and real estate people within the number of businessmen or did you just take into consideration the totals in each of the overall categories?

A. Just the totals in each of the overall categories.

Q. Now if you had taken into consideration factors [466] such as finance, insurance and real estate, showing 38, or almost half of the businessmen, would that have affected the probabilities?

A. It would have made the probabilities considerably smaller than they were.

Q. You found, did you not, without going into detail because the exhibit speaks for itself, similar illustrations of a large preponderance of businessmen of those engaged in finance, insurance and real estate, isn't that so?

A. I think it occurs in every one of the exhibits.

Q. Where there is a breakdown? A. Yes.

Q. Now, Doctor, with regard to the overall preponderance or overweighting of one group as compared to another, did you notice anything specific with regard to a tendency or trend for overweighting of certain groups and underweighting of others?

A. In every exhibit there is a tremendous overweighting of proprietors, managers and officials. In a great preponderance of the exhibits there is an underweighting of the opposite types and there is an underweighting generally of craftsmen, domestic service workers and the lower classes in the scale.

(Testimony of William S. Robinson.)

Q. How about laborers?

A. They are underweighted almost perfectly. There are very few of them. [467]

Q. I think you were in court when there was testimony with regard to the utilization of cards which had been accumulated at least since 1925 and probably prior to 1925 from 25,000 or 30,000 cards from which names were drawn for the selection of jury panels.

A. I was.

Q. In your opinion, Doctor, how would that affect, with reference to Los Angeles County, the possibility of obtaining a fair cross-section of the community?

A. It would militate obtaining a fair cross-section.

Q. Why?

A. Well, in particular it would have the effect of underweighting the lower classes on the scale, that is, the classes which come near the bottom of the list; in particular, craftsmen, operatives, possibly service workers, certain laborers. It would do so for the reason that migration into this region, especially during the war years, was primarily in those classes so that they are proportionately better represented in the population now than they were in previous years.

Q. Do you have any figures on that?

A. Well, I have some figures which give a rough indication.

The manufacturing employment—these are California [468] Department of Labor statistics—man-

(Testimony of William S. Robinson.)

ufacturing employment for Los Angeles in 1935 was 94,000. Now that is mainly operatives and craftsmen. In 1946 the average for the year was 239,500. Now those figures in themselves mean nothing, but if you relate them to the population at the time, in 1935 manufacturing employment, that is, mainly operatives and craftsmen, constituted 3.8 per cent of the total population; in 1946 they constituted 6.9 per cent of the population, or almost twice the percentage in 1935.

In other words, they are more heavily weighted in the population now, and any lists based on previous years would naturally not give them the importance which they have in the population at the present time.

Q. Even though they had been drawn in the first instance as a cross-section, is that right?

A. That is right.

The Court: What is it presently?

The Witness: 6.9 per cent.

The Court: That is to the total population?

The Witness: Yes.

The Court: That is craftsmen and workers?

The Witness: In the main.

The Court: In the main?

The Witness: Yes.

The Court: What did you call them? [469]

The Witness: Manufacturing employment.

The Court: Well, now, that population includes babies?

The Witness: That is true.

(Testimony of William S. Robinson.)

The Court: I suppose I in this premise can take judicial notice of the fact that babies are not lathe operators, and so forth?

The Witness: That is correct.

The Court: Then your figure would be larger, would it not, of the persons who were over 21 years of age of that particular class?

The Witness: Yes. But the sole point of the comparison, the sole point is a comparison, let's say, between 1935 and 1946, and the total labor force, which is the base we would like to use, would constitute the same proportion of the total population, very closely, in the two years.

The Court: How do you reach that conclusion?

The Witness: I reach that conclusion from observation and experience. I reach it in another way, if you like. The migration to Southern California is not the migration of single workers, but they bring with them their wives and their children, as is a well-known fact in the present housing conditions.

In other words, when you get a larger working population, labor force, you get a labor total population in about the same ranges. The people who migrate here are no different [470] in their composition, in their marital relationship from the people who lived there originally. So the figures based upon the total population, while not the right size for the total labor force, are nevertheless proportional to figures which would be based on the total labor force.

(Testimony of William S. Robinson.)

In other words, were we to base the figures on the total labor force rather than the total population percentage of the total labor force in this class, in 1946, it would be roughly double that in 1935.

Q. (By Mr. Margolis): And the percentage which these persons constitute of the total labor force would be much greater?

A. That is true.

Q. Than the percentage they constitute of the total population?

A. That is correct.

Q. So that the possibility of discrimination is increased when you take into consideration the total labor force instead of the total population, is that correct?

A. That is correct.

Q. Now also those figures do not take into consideration, do they, the families of the men?

A. They do not.

Q. And the figures would be increased by that if you considered the families? [471]

A. That is correct.

Q. Now is there any known experience about the extent to which workers move from city to city and place to place as compared with businessmen?

A. There is.

Q. What is the fact?

A. Workers migrate to a much greater extent than businessmen.

Q. What effect would that have?

A. Persons in the classes of craftsmen, foremen, operatives in particular, are known to be

(Testimony of William S. Robinson.)

considerably more migratory than proprietors, managers and officials.

Q. What effect would that have on the use of a list running back to 1925 or before that?

A. Since there has been an in migration to this region, it would tend to underemphasize or not to give due importance to the migratory element in the labor force, namely, craftsmen, operatives, and so forth.

Q. Another point that I want to get at, how about the possibility of migration out of the city of businessmen, or out of the county, of businessmen included in those 25,000 or 30,000 cards as compared with the possibility of migration out of the county of craftsmen or operatives or laborers who might have gotten into these cards?

A. If there were such migration, businessmen would [472] remain and workers would tend to migrate.

Q. That would be the general tendency?

A. Yes.

Q. Now during the testimony here there were a number of sources that have been referred to as having been used for the purpose of obtaining names. Now one of the sources—I think the most common source—was the telephone directory. Now assuming that names were obtained from the telephone directory in the best random method, in the most unbiased from a scientific standpoint method, would there be any probability of getting a cross-section of the community?

(Testimony of William S. Robinson.)

A. There would be an extremely small probability of getting a cross-section of the community.

Q. What do you mean by extremely small, running up into the millions?

A. Or the quadrillions.

Q. Why?

A. The reason is that the telephone book is biased statistically, I would say, upward economically. The lower economic classes are extremely underrepresented in the telephone book.

Q. Do you have any figures at all that you can give us to indicate that?

A. There have been a number of studies of telephone book representation for one thing, but there are data available [473] here which give us at least a rough indication of the fact that there are many families excluded, or many persons excluded, from the telephone book.

In 1947 the figures given by the telephone company for Los Angeles County are 562,000 residential telephones. If we multiply that figure by 3 or 4, which is somewhere around the number of persons per family, we get, let's say, 2 million persons for the population of Los Angeles County. Well, the known population of Los Angeles County is above 3 million.

Q. It is estimated at 3½ million.

A. That is right. In other words, there are a million and a half persons who are not in the telephone book, and those persons could be very easily shown to tend to be low income persons. In fact, they tend to be in the very low income ranges.

(Testimony of William S. Robinson.)

The Court: The estimated population, as I got the figures yesterday, is 3,747,962. What percentage of those are under 21? Do you have any studies on that, or any figures?

The Witness: We know the general shape. I can guess, if you like, though the figures are easily available.

The Court: Can't you figure that one out?

The Witness: As I say, I can make a good guess for it.

The Court: You haven't been guessing here, have you?

The Witness: No. That is why I refused to give you a statement now unless you label it as a guess. The figures [474] are available if you care to have them.

The Court: Where are they available?

The Witness: They may be available in the census volumes. They are easily available in the library.

The Court: That is to say, on past figures, on the 1940 census, for instance, the total population will give you the number of persons who were under 21?

The Witness: Yes. You can find the age distribution for the population by 5-year periods. You can find a summary figure always for the population 21 years or over, as well as the population 10 years of age and over.

The Court: Would that be in this volume you have for Los Angeles County?

The Witness: I don't know.

(Testimony of William S. Robinson.)

Mr. Margolis: I haven't examined all of that volume.

The Witness: I believe that is for the labor force and it may not be.

The Court: What do you mean, the labor force?

The Witness: The labor force is the population 14 years of age and over gainfully employed. There are many such bulletins on population issued by the census.

The Court: I understand, but that is the general characteristics?

The Witness: Then we should be able to find the population 21 years of age and over here.

The Court: Well, isn't there any standard figure used by statisticians that in a million people so many are under 21?

The Witness: There is not, for the simple reason that age distributions by cities, by counties, by states, and by nations differ markedly in their shapes and in the percentage of people of any age.

The Court: They do that more so than other distributions of labor and occupation, race and religion?

The Witness: There is no statistical basis for making a comparison of that sort. I simply can't answer that.

The Court: You can't answer that?

The Witness: No. There is no valid way statistically of answering that, as to the variability of different distributions.

The Court: Can you find that in there?

(Testimony of William S. Robinson.)

The Witness: I can look for it.

The Court: Well, now, there is a standard figure that you use for families, isn't there?

The Witness: Yes.

The Court: I was asking you a while ago about that.

The Witness: Yes.

The Court: Wouldn't there be some standard figure for

The Witness: If you ask me the mean age, I can tell you yes. [476]

The Court: You said the number of workers that come here would be the same for people who were under 21 because they brought their families with them and it wouldn't make any difference, that the proportion would be the same?

The Witness: That is right. And likewise—let me give you another example—the percentage of persons 21 years of age and over for the various states would be quite closely the same, if you except a few states, Wyoming in particular, South Carolina in particular, Montana, Washington, D. C., which is given as a state in the figures ordinarily, and if you except California and one or two other states. But what that percentage is I don't know because there is a percentage of 21 years and over, 22 years of age and over, 97 years of age and over, over 2 years of age and over, and all the rest. I don't carry all those figures in my head. As I say, I can find them if you want. I carry important things in my head.

(Testimony of William S. Robinson.)

The Court: See if you can find that in that book.

The Witness: I will see if I can find it.

Page 38 has age, race and sex by counties, 1940-1930. Here is given the ages for counties by 5-year age groups. So if we take—it is not given by yearly groups, though, in the detailed classification volumes, the big volumes, of which these are a small reprint, but you would be able to get the population 21 years of age and over. So far as the actual [477] age distribution, it is given by 5-year classes, so we can find the percentage of the population, let's say, 20 years of age and over, not 21.

The Court: Have you got that there?

The Witness: I can compute it.

The Court: For Los Angeles County?

The Witness: I have to find Los Angeles County first, for both male and female. If you can trust my addition, the figures will be roughly these—

The Court: Shouldn't we trust your figures after having given us all these mathematical computations?

The Witness: Statisticians are notoriously bad at mental arithmetic. When I did these calculations I used a calculating machine, with known checks on my operations.

The Court: By the way, did you do all these computations yourself?

The Witness: I did.

The Court: Or somebody working under your direction do them?

(Testimony of William S. Robinson.)

The Witness: I did them myself.

The Court: They are all your personal calculations?

The Witness: Yes, and they are all checked.

Q. (By Mr. Margolis): None of them are done by the arithmetical method, are they? [478]

A. No.

There were in 1940, 725,000 persons in Los Angeles County under the age of 20, and there were all told—wait a minute, I think I can get 21 years of age and over all told—there were in Los Angeles County in 1940, 202,000 persons, that is to the nearest thousand, 202,000 persons 21 years of age and over.

Q. (By Mr. Margolis): Do you mean over or under?

A. Twenty-one years of age and over.

Q. In Los Angeles County?

A. I am sorry. I am properly chagrined. There were 2,019,000 persons 21 years of age and over. The total population was given in 1940 as 2,786,000 if we deal only with thousands, and the difference would be 767,000 persons under—I am sorry.

The Court: 786,000 persons who would be under 21 years of age.

The Witness: 767,000 I get.

The Court: What was the last figure?

The Witness: 767,000.

The Court: There is 2,019,000 twenty-one years and over, and a total of what?

The Witness: A total of 2,786,000. That gives 767,000 under 21. [479]

(Testimony of William S. Robinson.)

The Court: What percentage is that?

The Witness: I have no slide rule with me but I can divide it.

The Court: About 25 per cent, isn't it?

The Witness: It is a little more than 25 per cent.

The Court: Not much. If it were 700,000 even an 2,800,000 even it would be exactly 25 per cent.

The Witness: That is right.

The Court: So it is about 25 per cent.

The Witness: But it is less than 2,800,000 and it is considerably more than 700,000. In fact it is 30 per cent at least.

The Court: It is 30 per cent?

The Witness: No, I am sorry. It is 28 per cent roughly.

The Court: 28 per cent?

The Witness: 28 per cent or 29 per cent. The figure I was going to give you, my guess, was 30 per cent.

The Court: To get an approximation it would be $27\frac{1}{2}$ per cent, is that right?

The Witness: That is approximately.

The Court: You say $27\frac{1}{2}$ per cent?

The Witness: My guess is that it is closer to 29, but I am not sure.

The Court: That is a lot of people. Which one do you want to say? [480]

Mr. Margolis: Did you compute it exactly?

The Court: Which one is your opinion?

(Testimony of William S. Robinson.)

The Witness: We don't need to worry about it if you will let me go to the table and get a slide rule.

Mr. Margolis: Do you have your rule there?

The Witness: Yes. (Making calculation) The answer is 27.6 per cent. So you were right on the nose, so to speak.

The Court: Roughly 27½ per cent.

The Witness: Yes.

The Court: So that you would say that the population increases with the population increases and that the percentage today would be about the same?

The Witness: Correct.

The Court: All right.

Q. (By Mr. Margolis): Now you were discussing the change in the character of the population here.

A. That is correct.

Q. Had you finished your answer on that?

A. Except for perhaps summarizing it. The change in the character of the population has not been one particularly in age distribution or sex distribution but mainly one of occupational distribution. I think, in fact, we had gone on to the telephone book, hadn't we?

Q. Yes. That is why I was hesitating. I wondered [481] how we had gotten back to that.

On the telephone book you had said that there were 567,000—

(Testimony of William S. Robinson.)

A. 560,000 residential telephones, 562,967, as given by the telephone company.

Q. And you considered that that covered roughly 2½ million people and you were counting people of all ages? A. That is correct.

Q. And when you say that roughly a million and a half people are not in the telephone book, that includes people of all ages, is that right?

A. Yes, and not merely babies in houses separately.

Q. So that all that we get there is a proportion figure, say of roughly somewhere in the neighborhood 2 to 1? A. That is correct.

Q. So maybe one-third of the people in Los Angeles County, somewhere in that neighborhood, are not in the telephone book?

A. That is correct.

Q. I think you said that as to that one-third they would be mostly if not almost entirely in the lower economic groups?

A. That is correct.

Q. Now another source that was used to a much more limited extent was—— [482]

The Court: Pardon me, while you are on the telephone book. Do you have any figures on the number of people who have telephones who are not listed?

The Witness: I have no figures, but it is a very small percentage of the total.

The Court: How do you know it is if you have no figures?

(Testimony of William S. Robinson.)

The Witness: I went into the matter once for Manhattan Island in New York, and the percentage was less than one-tenth of 1 per cent.

The Court: That was in New York?

The Witness: That was in New York.

Mr. Margolis: We can get that figure, your Honor.

The Court: I am just trying to find out the basis of his opinion. I know that those things do occur.

The Witness: They occur, that is true, but they are a very small percentage of the total. They are available for Los Angeles at the moment, if you would like to have them.

The Court: Those that are unlisted?

The Witness: Yes. Not the listings but the number of them that are unlisted will be available.

Q. (By Mr. Margolis): All right. Now another source that was used, Dr. Robinson, was some list of registered automobile owners. It wasn't made quite clear whether that was a list of a certain type of automobile owners or a list of all automobile owners, [483] or exactly that it was, but it was a list which was believed to be furnished to insurance companies. Now with that kind of knowledge about the list that was used, would you have any opinion as to whether such a list would be calculated to give a representative cross-section of the community, even though names were drawn from it completely at random and scientifically?

A. It would not give a representative selection from the community.

(Testimony of William S. Robinson.)

Q. Why not?

A. It will be biased more probably than the telephone book itself upward economically. That is, it will not include persons of low income groups, low economic status, and particularly so if it is a list such as lists given to insurance brokers or companies for the reason that those are new automobiles that insurance companies are particularly interested in.

The Court: Let's see, while we are on the subject of automobiles, do you have the figures recently released—I saw them but I have forgotten them—on the number of automobiles in Los Angeles County in ratio to the population?

The Witness: No, but it will be a very large number in comparison with other sections of the country.

The Court: As I recall, the figure was something like 1 automobile to 2.2 persons, or something like that. [484]

The Witness: That is correct. So that those persons not on the list will be very low income persons.

The Court: Will be very low income persons?

The Witness: That is right.

The Court: Do you think that they would be apt to be registered voters?

The Witness: They are very much more likely to be registered voters than automobile owners.

The Court: Upon what do you base that?

(Testimony of William S. Robinson.)

The Witness: Upon at least, I should say, 25 studies of the representativeness of publicly available lists of that sort.

The Court: That is, of registered voters?

The Witness: Of registered voters, of automobile owners, of automobile registrations, of telephone books, of city directories—what other lists are there—those are all that I can think of at the moment. But that subject has been gone into very thoroughly by people who do professional sampling.

The Court: Did you ever do that in Los Angeles, for instance, among the Mexican population, of which there is a very large segment here? I think it is estimated to be some place in excess of a quarter of a million Mexicans. Did you ever determine what percentage of them own automobiles and are not registered voters?

The Witness: No, but I have read four studies dealing [485] with that subject in Los Angeles for all racial groups that are important here.

The Court: On the question of whether or not they own automobiles and were and were not registered voters?

The Witness: On the question of relative representativeness of those kinds of publicly available lists.

The Court: Of those kinds of lists?

The Witness: That is correct.

The Court: But do you have any figures at all, or do you know anything at all, about the number

(Testimony of William S. Robinson.)

of Mexicans that are registered here compared to the number that reside in Los Angeles County?

The Witness: I have no figure, and I don't believe one could get them because the citizenship of, and even the nationality of, Mexicans is not given in the 1940 census, as Mexicans are counted as whites.

The Court: You could get enough information to form some opinion, couldn't you?

The Witness: If I set out specifically to do so with, let's say, a crew of interviewers I could probably do that.

The Court: Most of the welfare agencies, a lot of the Catholic churches and schools, public schools, have records indicating the Mexicans, do they not?

The Witness: That is correct, they do.

The Court: But you are not prepared then to express an [486] opinion as to the number of Mexicans, and so forth, that are here in the total population because that figure isn't given in the 1940 census, and you are not prepared to express an opinion as to the number of Mexicans or percentage that are registered who do live here?

Mr. Kenny: Your Honor, could I break in, because that is a very important point. The public schools, I am quite sure, do not make a segregation—and I think this is for the good name of our community—they do not attempt to classify children of Latin-American parentage as anything other than white, nor is there any effort made in the public schools to do so.

(Testimony of William S. Robinson.)

The Court: Weren't you asking me some question a while ago about some Mexican names?

Mr. Kenny: Precisely.

The Court: In order to point out people whose names were Mexican?

Mr. Kenny: I didn't want that to go unanswered in the record, that the public schools of Los Angeles County, where I was their legal advisor for a long while, did conduct any such discrimination between children as to race. I just didn't want to let that stand unanswered in the record.

The Court: No one is making such a statement for the record.

Mr. Kenny: I think your Honor commented to that effect [487] I just want to have it straightened out.

The Court: You have made your statement for the record.

The Witness: May I finish answering the question?

The Court: Judge Kenny's remarks led my mind off into this questionnaire that is proposed. They ask, what is your race, in the questionnaire recommended by the Conference of Senior Circuit Judges. Is that discrimination?

Mr. Kenny: I think so, your Honor. I would think so. I think if they had thought it through they certainly wouldn't have done it.

The Court: All right.

(Testimony of William S. Robinson.)

Mr. Calverley: If the Court please, in that connection I would like to interrupt. As I recall it on that particular exhibit, regarding the recommendation of the judicial Conference of Senior Circuit Judges, there was reference made to a subsequent report, or recommendation of Judge Knox' committee, which the clerk was not able to locate here in this building. A request was made of the attorney general as to whether or not there had been a subsequent report and what recommendations were made, and we have here a copy of our teletype to the attorney general for that purpose, and also a copy of the reply which I would like to introduce in evidence.

The Court: They will be made a part of Exhibit 2, if there is no objection.

Mr. Calverley: I note in it, however, that the recommendation [488] was—I believe that that was question No. 13—that question 13 be eliminated, which refers to race.

The Court: Whatever it is, this is the official Exhibit No. 2.

The Clerk: Yes, your Honor.

(The documents referred to were received and made a part of Government's Exhibit No. 2.)

The Court: Is there any objection to it becoming a part of the record?

Mr. Margolis: No. It supports Judge Kenny's position.

(Testimony of William S. Robinson.)

The Court: All right. Will you read the question?

(The question referred to was read by the reporter, as follows:

("The Court: But you are not prepared then to express an opinion as to the number of Mexicans, and so forth, that are here in the total population because that figure isn't given in the 1940 census, and you are not prepared to express an opinion as to the number of Mexicans or percentage that are registered who do live here?") [489]

The Witness: I did not and I would not venture to guess at the percentage without making some kind of investigation into the information which is available.

The Court: Without setting up a formula?

The Witness: Without setting up a formula.

Q. (By Mr. Margolis): Do you know of any studies which have been made on that precise subject?

A. None explicitly and completely dealing with Mexicans.

Q. But there have been studies made with regard to the representativeness of lists of registered automobile owners generally as compared with, say, the motors registered?

A. Yes, and not only that but of the racial representativeness, if that is the major concern here.

(Testimony of William S. Robinson.)

Q. And what has the showing been?

A. That the registered voters are more—I am sorry—that races are much more adequately represented among registered voters than among automobile registrations.

Q. One of the lists that was used a number of years ago, a few names, was from railroad brotherhoods. Would that be representative of the community? A. It would not.

Q. Why not?

A. Because naturally it would underrepresent the classes except the particular classes into which railroad [490] people might fall. I suppose mainly it would overrepresent operatives and would certainly underestimate professional, managers and officials.

The Court: That is employment classes, you are not thinking of social, racial or religious classes?

The Witness: Occupational classes.

The Court: Occupational classes only?

The Witness: Yes.

I might add that social, racial and religious classes are very highly correlated with occupational classes, so that when you talk of one you are talking of the others at the same time. Catholics tend to be in the lower occupational classes in this list and Protestants in the higher. The relation is not tremendously strong but it is a very pronounced tendency. And the same is true of racial and other kinds of classifications.

(Testimony of William S. Robinson.)

The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?

The Witness: Occupation is one of the best control factors as a statistical factor in getting a representative sample.

The Court: Read the question again.

(The question referred to was read by the reporter, as follows: [491])

(“The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?”)

The Witness: If it is phrased in absolute terms I cannot answer.

The Court: I asked for your opinion. Read it again, Mr. Reporter.

(The question referred to was reread by the reporter, as set forth above.)

The Witness: You will get better representation of all economic, racial and religious classes if you have a cross-section of occupations than if you do not.

The Court: Let's strike the answer out. You mean to say you cannot answer that question? You do not have an opinion on it?

Mr. Margolis: If your Honor please——

The Witness: I have an opinion.

(Testimony of William S. Robinson.)

The Court: It isn't a question of the better representation here, the Court says that you have to get a fair cross-section of the community representing racial, social, economic and religious classes. So that is what this ultimate inquiry is about.

Mr. Margolis: I think it would be proper to ask the witness at this point whether the utilization of occupational classifications would be a sound method of obtaining a [492] fair cross-section.

The Court: I think that is my question.

The Witness: It would.

The Court: Will you read that question again, Mr. Reporter?

(The question referred to was read by the reporter, as follows:

("The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?")

The Witness: You see, I want to protest, if I might, against that question. If you will give me sufficient time I can explain to you why I cannot answer it. But it makes no sense in statistical terms.

The Court: It makes no sense?

The Witness: It makes no sense. It is utterly meaningless in the terms of operations which a statistician performs, and I can show you—or I can try to restate it so that it is satisfactory for you and still be answered. As it is stated, I cannot answer it.

(Testimony of William S. Robinson.)

The Court: Then I have a witness here who can pull himself up by his own bootstraps and make himself qualified on any subject at any time—a witness who is going to ask the questions and answer them too.

Mr. Margolis: May I point this out, your Honor? With [493] regard to your question——

The Court: Do you object to my question?

Mr. Margolis: Yes.

The Court: State your ground of objection.

Mr. Margolis: On the ground that it is ambiguous and uncertain.

The Court: The objection is overruled. If that is ambiguous and uncertain, I don't know what we have been talking about here all week.

Mr. Margolis: May I state the basis for it?

The Court: If it is an extension of the argument on the basis that it is ambiguous and uncertain, I do not care to hear it.

Mr. Margolis: If your Honor please, I would like to point out something with regard to that question that I think your Honor should hear. I think it is only fair that your Honor should hear it.

The Court: Go ahead and point it out.

Mr. Margolis: When you ask whether that will result in the representation of all classes——

The Court: I did not ask him that. I asked him if in his opinion——

Mr. Margolis: It would result in the representation.

The Court: That is right.

(Testimony of William S. Robinson.)

Mr. Margolis: All right. Obviously if you took, let [494] us say, a sample of 10 people it would not result in a representation of all classes but it would result in an opportunity of getting a fair cross-section.

The question as to whether it would result in a representation of all classes depends upon the size of your sample. If your sample is 3 people it cannot result in a representation of all classes.

The Court: Let me hear the question again.

(The question referred to was read by the reporter, as follows:

“The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?”)

The Court: Do you understand that question? Do you understand what occupational cross-section in that question means?

The Witness: My difficulty is this, you haven't said an occupational cross-section where you select randomly from the occupations.

The Court: I think that that is a fair assumption from that question, if you have an occupational cross-section of the community. I didn't intend to put in the random selection there. If you have an occupational cross-section of the community—well, there is the question. [495]

(Testimony of William S. Robinson.)

The Court: Will you read the question again, Mr. Reporter?

(The question referred to was read by the reporter, as follows:

("The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?")

The Witness: Not necessarily.

The Court: Go ahead.

Q. (By Mr. Margolis): Will you explain that answer, Doctor?

A. Yes. I can pick a sample with bias, an intentional bias, so that it will have the right proportion of all occupations in it, but it is composed only of Catholics, or only of Protestants. If I have a random selection within the occupational cross-section, then it will be representative of the racial, religious and other groups.

The Court: When you say random, you mean a statistical random?

The Witness: That is correct. [496]

Q. (By Mr. Margolis): And the method, for example, that is being used in the Superior Court you would consider a statistical random method, is that right? A. Yes.

The Court: Do you have any opinion how to get a statistically random method here where we have a man who is paid \$15 every six months, and

(Testimony of William S. Robinson.)

a jury commissioner and a clerk who has to have his help do it in between other things?

The Witness: I do.

The Court: What is it?

The Witness: I can show him very simply, showing a table of random numbers, how to take names from the voters' registry as fast as any typist can type them off, purely at random from the voters' register.

The Court: Will you tell us? Will this interrupt your questioning?

Mr. Margolis: No. Go ahead.

The Court: Sooner or later I suppose you are going to get to it anyhow?

Mr. Margolis: Yes.

The Witness: The procedure would consist of using, let's say, two tables of random numbers, or two sheets of random numbers that are different, one for selecting the page or the sheet from the voters' register, and the second for [497] selecting from that page or sheet——

The Court: By that you mean precinct?

The Witness: Precinct—the second for selecting from that precinct at random one or more of the names in that precinct.

Q. (By Mr. Margolis): It would depend on the number of names you wanted as to how the selection would be made?

A. Yes. But if you went along doing this selecting first a precinct at random, then at random a name within the precinct, you would have a ran-

(Testimony of William S. Robinson.)

dom sample wherever you stopped. It could be done as quickly as the names could be typed on this sheet.

The Court: That is, provided you had the sheets available?

The Witness: That is correct.

The Court: Let's take this random number sheet, table of random numbers. Are there several tables of random numbers?

The Witness: There are several tables and the tables are many pages. I have an extended table. I am not sure whether I have it with me or not.

Q. (By Mr. Margolis): Do you have it with you?

A. I think I had it in my car. I had it with me yesterday. [498]

The Court: This is just one page?

The Witness: This is just one page from a fairly extensive table.

The Court: How do you pick your random numbers, by another system of random numbers?

The Witness: They are picked in a number of ways. They are picked by machines, what are called random machines; sometimes numbers are put on physical circular slips in a great drum and stirred and drawn out. There are various ways in which they are picked.

The Court: That is the way these numbers are drawn? In other words, these are drawn similar to the drum of marbles that you were talking about?

(Testimony of William S. Robinson.)

The Witness: I don't believe those were picked in that way. I believe they were picked as the third from the last digit in a column of census figures for England and Wales.

The Court: The third from the last digit?

The Witness: Yes, of the population, as I remember, of the counties or shires or something of the sort, from the census figures of England and Wales.

The important point is not so much how they are picked, as it is the fact that they have been tested, that is, they have been used to check established mathematical derivations and they give the results which the mathematics calls for. [499]

The Court: This table of random numbers, Exhibit V, at the top you have consecutive numbers 1 to 20, that is, there are 20 columns.

The Witness: Those are simply numbered columns.

The Court: And you have 45 lines.

The Witness: That is correct.

The Court: Now there are 5894 precincts. What would be the first thing you would do in picking a precinct?

The Witness: I would take blocks of the first four columns of digits, that is, the digits occur in pairs so I would take the first two pairs, say the left-hand four rows——

The Court: The left-hand?

The Witness: The left-hand four columns, I should say: There are four digits on the first row

(Testimony of William S. Robinson.)

at the very left-hand side. If you will read them off to me I will tell you what I would do.

The Court: 22, 17, 68—

The Witness: 22, 17 are the first four. I would pick Precinct 2217 to get my first name from.

The Court: Then you would take another table of random numbers?

The Witness: And if they were only, let's say 1000—I suppose precincts might run to 1000, might they, in population?

The Court: No. Precincts average about 350.

The Witness: Then I would take three digit numbers for my other table, and if you want to read me the fifth, sixth and seventh digits?

The Court: I will read the one under Table 16 and 17; there is 61, 09.

The Witness: 610 would be the number because there are only three digits required. I would disregard that number until I came to a number without a zero.

The Court: The next column would be 85, 52; the next one is 16, 71.

The Witness: I would pick the 167th name from precinct, whatever precinct we decided on before.

The Court: Those names are not numbered.

The Witness: Then they would have to be numbered.

The Court: Somebody has to count down to the 167th name then?

Mr. Margolis: I believe those names are numbered.

(Testimony of William S. Robinson.)

The Court: Let's see the precinct sheet.

Mr. Margolis: They are on some of the precinct sheets.

The Witness: If they are not numbered there are other ways of doing it.

The Court: (Examining exhibit) They do not number them.

The Witness: Then there will be some easy way of doing it, some adaptation of this perhaps to pick columns at random and then items within columns or something of the sort. [501]

The Court: Hold it up, Mr. Clerk. Let us see how many columns and names there are.

The Witness: Are the names one to a line only?

The Clerk: There are four columns.

The Court: There are four columns?

The Witness: It is possible to prepare a key sheet which is laid over that, or alongside of that, which has the numbers on it which can be used for each precinct sheet.

The Court: Then what you would do is, you would pick the 167th name in every precinct?

The Witness: No, just in that one precinct. Then I would select another precinct at random and I would select a name from that one.

The Court: You would take the next number, 192?

The Witness: No, I need a 4-digit number for the precincts.

The Court: Why a 4-digit number?

(Testimony of William S. Robinson.)

The Witness: Because precincts run to 5000. That requires four digits. What are the four numbers?

The Court: 19, 36.

The Witness: Then I would pick Precinct 1936. Then randomly I would like to pick one name from within that.

The Court: Now Precinct 1936 is up high in the city of Los Angeles, but as I recall there is something like 30 separate precincting systems, or 32, aren't there, Judge Kenny, [502] in the county?

Mr. Kenny: Yes. Of course what the doctor would do is not use the numbers of the registrar of voters, he would renumber them because there are various precinct sheets. In other words, you would have to renumber them.

The Court: You would have to renumber all precincts in the county?

The Witness: No, it doesn't matter.

Mr. Kenny: I might say, I have done that in taking straw votes, which have always given pretty bad results for me too, but I have done that. That is, you take 5000 precincts and in order to get what you want you don't use the registrar's numbers because you keep running into Santa Monica, or Placentia which have their own numbers.

The Court: You mean you didn't do that?

The Witness: The point is now —

The Court: In the city of Los Angeles?

The Witness: May I ask a question?

The Court: Yes.

(Testimony of William S. Robinson.)

The Witness: These precincts are numbered according to geographic regions, is that correct? That is, the 1000s are somewhere in the city?

The Court: There is about 3300 in the city, and they are numbered. They start out originally, I think, numbering them at the City Hall but now they skip all over. Every time [503] they add a section to the city, no matter where it is, why those precincts are added.

The Witness: As long as there are no precincts with no duplications in the numbers given the different precincts, they can be numbered any way you like.

The Court: They are indicated, for instance in Long Beach they begin with Long Beach Precinct No. 1 and go on up to whatever it is. I think it is probably about 200. Then there is Placentia Precinct 1 to 13.

The Witness: Then the 5000 precincts would have to be numbered consecutively and whatever order was convenient from 1 to 5000.

The Court: Let's say you have 32 given precincting systems.

The Witness: You might select randomly one of the 32 to begin with and keep the names within the precincts which you get.

The Court: Then you would take three random tables, let's say?

The Witness: That is not necessary. I would sooner number the 5000 precincts in any order whatever and that would give me a lot of time.

(Testimony of William S. Robinson.)

The Court: Wouldn't you need a lot of clerical help?

The Witness: I have numbered more than 5000 names without any clerical help and given lectures as well. [504]

The Court: You are a remarkable person. The clerk, however, has a lot of work to do besides this.

The Witness: There are numbering machines which will stamp them for you automatically as far as you can stamp them, I would say, roughly 20 to 30 a minute.

The Court: Well, then, you don't have any suggestion concerning this unless the precincts are renumbered? That is the essence of your testimony?

The Witness: No, I have if the precincts are not renumbered, but it would be inefficient to do it that way.

The Court: It would be inefficient?

The Witness: That is right, to select, let's say, the cities or incorporated places, whatever they are, Long Beach, Placentia, select them at random and number them from 1 to 33. I would select first from those general regions randomly to number them, then select randomly a precinct from the region selected, and then select randomly the name from the precinct within the region selected. That is laborious with renumbering the precincts.

Q. (By Mr. Margolis): You mean renumbering is the efficient way, the other way is not efficient?

(Testimony of William S. Robinson.)

A. That is correct.

Q. And the result is just as good one way as the other? [505]

A. That is correct.

Q. Let's see if we can get this straight, Doctor. You would number the precincts?

A. With a \$2.50 numbering machine.

Q. And then——

The Court: Did you ever try to get one from a department of the government?

The Witness: I never have. I don't even own one myself, as far as that goes. I use a pen.

Q. (By Mr. Margolis): You would number them either with a \$2.50 numbering machine of a 2½-cent post office pad? A. Right.

Q. After they were numbered, you would then use your random tables of numbers for the purpose of securing precincts?

A. At random.

The Court: This is one random table?

The Witness: That is correct.

Q. (By Mr. Margolis): Then you would use the——

A. I might use the next three digits in the same random table for selecting within the precinct. I only need one table.

Q. It wouldn't make any difference? [506]

A. It wouldn't make any difference.

The Court: This is one table?

The Witness: This is one page from a table. It is not one page from a table, it is one mimeo-

(Testimony of William S. Robinson.)

graphed sheet which is really, I should say, slightly over half of one page of a published table of random numbers.

The Court: Could you use this one sheet and still get a random selection?

The Witness: I might run out of that one sheet, but for two shillings—whatever that would amount to in American money—you can buy 10,000 random digits which are quite adequate for your purpose.

Q. (By Mr. Margolis): Doctor, I would like to get at this. That is one method you have described. Let us assume that you want to get 1000 names. You know in advance that the number of names you want to get is 1000. Would there be any system available without use of the random tables, such as taking precincts in a certain order and names on those precincts in a certain order which would be satisfactory?

A. It would be difficult to do, laborious, I should say to do, unless you ultimately intended to exhaust the population, as they do. I understand, in the Superior Court. That is, unless you intended to adopt a rotational system so that ultimately in every 10 or 20 years you get in the whole [507] group. It could be done, but it would be more laborious than the method I propose.

Q. But you could take, for instance——

A. You could take every 20th name or every 900th name, but that requires counting. If you don't introduce the random element, the only other way of taking a fair sample is to take every nth

(Testimony of William S. Robinson.)

name. It doesn't matter how the names are numbered to start with, if you take every nth name you would get a fair sample, but you have to count to get the nth name.

Q. Could you take every 9th name and every 5th precinct.

A. Yes. That is equivalent to it, but then you have to take, if you start with 1, 10, 19, the next year you have to start with 2, 11, 20, or you are going to get into trouble.

Q. The numbers that are selected must vary from year to year?

A. Systematically clear throughout the whole range of names, or else you must introduce a random element, one or the other.

The Court: I should say, counsel, having had some experience in government offices, that it would be practically impossible to get the administrative offices of the United States courts to finance the method used by the county, circulating all 5000 precincts here to get a name from each one.

On the random table method, I would like to pursue that [508] a little further, if I may, without interrupting your line of thought.

You heard the testimony here that the terms of court, so-called, are six months, that every six months new names go into the master box. It has to be a new list of available names.

The Witness: I understand.

The Court: At least every six months.

The Witness: Yes.

(Testimony of William S. Robinson.)

The Court: You would use one random table and then what would you do on the next six months, use another table?

The Witness: Or read the numbers backwards, or take the second, third and fourth and fifth digits instead of the first, second, third and fourth; or I would read the numbers diagonally.

The Court: Just with one table?

The Witness: Yes. That is a rather small table to do it with, but one complete table is all that is required.

The Court: Will you produce one at the noon hour?

Mr. Margolis: Do you have it in your car?

The Witness: I am not sure, but I think I have. Otherwise it is at home. Well, at noon I can produce it anyway, I guess.

Mr. Margolis: If we had two shillings, could we buy one from you? [509]

The Witness: I don't think it is available in Los Angeles. In New York you can get it at the McMillan Company, if they happen to have it in. But it is photostated very admirably and very easily.

The Court: You mean they charge two shillings to look at this?

The Witness: I mean that the booklet costs two shillings. It is one of the University of London's tracts for computers. [510]

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): Now, Dr. Robinson, another source that was used, according to the testimony of Mr. Brown, were clubs, among which were the Friday Morning Club, the Ebell Club, and Los Angeles Country Club, the California Club and the Parent-Teachers Congress. What is your opinion as to the possibility of obtaining any kind of a fair cross-section as a result of the use of such lists?

A. Such a list will not give a fair cross-section.

Q. Why?

A. All you need to do, the only club in that list that I know is the Ebell Club, but if you will look at the automobiles surrounding the Ebell Club some morning, or some afternoon, you will see that that list is upward by itself economically considerably more than, say, the registration for all automobiles. You will find no Model T Fords among them.

The Court: You mean you look at that when a meeting is in session?

The Witness: That is true.

The Court: The Ebell Club is rented for lectures. [511]

The Witness: If you make sure of the fact that the Ebell Club members are parked outside. It is a well-known fact and I think requires, in fact I think it was brought out very plainly in the examination of Mr. Brown himself, that those clubs, or the membership of those clubs, is in the higher economic levels. There is certainly adequate evidence upon that fact published in scientific journals.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): Now another source is this blue book, which is in evidence as Defendants' Exhibit U. You might take a look at it, Doctor, and tell us, could we get a fair cross-section by taking, let's say, 1500 names out of that book?

Mr. Calverley: Your Honor, I don't like to object to this line of questioning—it is very interesting—but the witness is testifying to matters here upon which no foundation whatever has been laid.

The Court: No, there isn't any foundation laid.

Mr. Calverley: He is just giving offhand opinions as to whether or not these sources are representative, just based upon his ideas about it. We object to it on that ground.

Mr. Margolis: He is an expert.

The Court: I have let all the rest of it in, I might as well let the blue book in.

Mr. Margolis: The blue book is in evidence.

The Court: I mean his opinion on the blue book.

Mr. Margolis: I don't know what additional foundation your Honor thinks is necessary.

The Court: I should think that in order to be able to testify he should know more than he knows, because the witness hasn't shown that he has had any mathematical sampling formula in relation to the blue book or the Ebell Club or the Friday Morning Club.

Q. (By Mr. Margolis): Let me put the question this way: With your knowledge of sampling and statistical methods and through an examination of that blue book, which is in evidence as De-

(Testimony of William S. Robinson.)

endants' Exhibit U, can you state whether or not it will be possible to get a fair cross-section from that blue book by taking names at random, or any other way, from it?

Mr. Calverley: Same objection, your Honor. He has made no examination of this book itself.

Mr. Margolis: He is examining it now.

The Court: I don't know how he can tell by looking at that book what the background of the people is.

Q. (By Mr. Margolis): Let me ask this question: Can you tell by examining the book, Doctor, whether you can get a fair cross-section from it?

A. I cannot, not by examining the book.

Q. Can you tell by any other method?

A. I am somewhat puzzled as to whether or not I should volunteer information or not.

The Court: You have been doing a pretty good job at it so far.

The Witness: Anything that I have said—let's put it this way—I can document very thoroughly from undisputable scientific sources that fact. What I was going to do was to comment on this book by saying, if you will read an article in the American Sociological Review by Frederick F. Steffan, called "Practical Problems in Sampling Procedure"—and Dr. Steffan happens to be a consultant to the census department, and he designed the sampling scheme for the 1940 census for getting additional questions—you will find there a list of what are called "red flags," things never to take samples from, and they are telephone books, city directories,

(Testimony of William S. Robinson.)

blue books, Who's Who, and there is a long list of them. Now that is an established available scientific reputable information. I happen to be basing my answers upon that fact and that knowledge. It is not hearsay, it is not any personal opinion. Anything I say I can document and I can prove anywhere that you want to prove it on a scientific ground.

Now if you want those references or if you want me to bring them in, I have reprints of them in my files, and I will be happy to do so. But I am not giving you opinions, I am giving you what any competent, social, scientific man [514] would agree with.

The Court: And you say you think the competence of every social scientist can be established?

The Witness: Yes.

The Court: Do you accept the witness' statement, counsel, now or are you offering him as an expert witness yet?

Mr. Margolis: I am offering the testimony as it stands.

The Court: You are offering him as an expert witness.

Mr. Margolis: Yes. I am offering him as an expert witness.

The Court: As an expert witness?

Mr. Margolis: Of course, your Honor.

I want to say this, I think it is a little bit farcical to trace this question of what a blue book is. I think it is a matter of common knowledge what a blue book is.

(Testimony of William S. Robinson.)

The Court: I have a blue book at home, which is a roster, and which is called a blue book. It was a list of officials. That is what I thought you were referring to originally when you said the South-west Blue Book.

Mr. Margolis: The term "blue book" I think is commonly known and also used in connection with social registers. If this is that type of a blue book it can easily be ascertained by examining the blue book.

The Court: Yes, I read the preface. [515]

* * *

Mr. Margolis: You will find also at the back of this book what is known as a club register.

The Court: Yet me see the book a moment, will you please?

(The volume referred to was passed to the Court.)

Mr. Margolis: It starts at page—I was going to indicate the page at which it starts for the purpose of the record. [516]

The Court: I don't see any occupations indicated here at all except where somebody, for instance I notice somebody is a lieutenant, and I notice that he was given here as a junior, but the rest of them do not seem to have any occupations at all. They give their children's names and the clubs they belong to.

Mr. Margolis: I think if it cannot be concluded from that, that it is a social register of the people

(Testimony of William S. Robinson.)

in the higher economic levels, then we are just not people with common, ordinary intelligence, it seems to me.

The Court: That is what it says it is, a social register.

Mr. Margolis: Of course, your Honor. And also if you will look at the names and addresses of the clubs to which they belong, we just have to be blind to reach any other result, it seems to me, your Honor. I think this has reached a rather ridiculous extreme when there is any contention being made that that can possibly constitute a cross-section.

The Court: I don't know that anybody contended that it constituted a cross-section.

Mr. Margolis: That is all I am trying to get out of this witness as an expert, is that it does not, and I think that there is a reasonable basis for it, and to object that there be no reasonable basis for it, I think is just to blind [517] oneself to fact and say, "I don't want to see. I don't want to know what is going on."

The Court: Are you suggesting that that is my attitude, counsel?

Mr. Margolis: No. I am addressing myself to the objection. There has been an objection, and I think I have a right to address myself to the objection, and the objection is on the basis that I say, which is the type of objection which says, "We don't want to know the facts, we don't want the facts in the record." That is the level of the objection.

(Testimony of William S. Robinson.)

The Court: This is in the record. This book is in the record and it speaks for itself.

Mr. Margolis: I am talking about the objection.

The Court: Let me ask the witness, did you ever see this book before?

The Witness: I consulted it the other day after it was here.

The Court: After it was here?

The Witness: Yes. I am happy to add that I am not in it.

The Court: You are no doubt discriminated against.

The Witness: Undoubtedly.

The Court: Did you ever consult the publisher, Lenora King Berry?

The Witness: I did not. [518]

The Court: Can you tell by looking at this book the occupations of any of these people?

The Witness: I cannot. I could estimate their relative incomes in comparison with that of the average for the country.

The Court: Here is a page—I don't know whether it is at random or not, but I just happened to have it open—it says: "Deborah Coulter Sedgwick (Junior)." Can you tell what her occupation is?

The Witness: I cannot.

The Court: There are no clubs listed, nothing at all except Deborah Coulter Sedgwick Jr., 2203 Seventeenth Street, Bakersfield; telephone 2-8483. Now can you tell by looking at that name anything about that person's economic class, status, age?

(Testimony of William S. Robinson.)

The Witness: I can tell by looking at her name and the fact that it is in this book that her average income is larger than the average income in the United States.

The Court: You can tell that?

The Witness: You bet!

The Court: Are all your opinions as you have expressed them here based upon the same methods that you have reached that opinion?

The Witness: They are not.

The Court: They are not? [519]

The Witness: No.

The Court: I will sustain the objection and strike his testimony concerning the Friday Morning Club, the Ebell Club and the other club, whatever it was.

Mr. Calverley: The University Club I think was mentioned.

The Court: I do not think he mentioned that just recently.

Mr. Calverley: The Los Angeles Country Club, I believe it was.

Mr. Garrett: There is testimony, I think, your Honor, related to the Ebell Club.

The Court: The Ebell Club and the Friday Morning Club.

Mr. Margolis: I trust that some evidence will be offered about the laborers that belong to these clubs and the operatives that belong to them and who are in the blue book.

(Testimony of William S. Robinson.)

The Court: If you are trying the people in the blue book, that is one thing, counsel; if this is an inquiry to ascertain whether or not the clerk and the commissioner of this court endeavor to secure an impartial jury, or used methods which were not designed to discriminate against any class, that is quite another thing.

Mr. Margolis: Our point is this—I tried to make it clear; I want to make it clear again—we are not concerned with motive, we are not concerned with specific intent; we [520] are concerned with the use of a method which is designed to achieve a particular result, and any time that that method is used, it is our contention that if that method is designed as one which will lead to a particular result which is not a cross-section then that method is to be condemned.

Mr. Calverley: If the Court please, on that point I want to make this brief statement in support of the objection to this witness' testimony. Apparently that statement of counsel is based upon the Thiel case, which is the only case that discusses discrimination as to prospective jurors on the basis of their economic status as distinguished from race and sex. I am reading from page 220 of the opinion, which is in Volume 328 U. S.:

“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of

(Testimony of William S. Robinson.)

the community (citing *Smith v Texas, Glasser v United States*). This doesn't mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community. Frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional [521] exclusion of any of those groups."

I point out, your Honor, that that is in the conjunctive, not the disjunctive. It must be that the discrimination is systematic and intentional, and there is no evidence in this record whatever of any intentional exclusion of any of the groups mentioned by the court.

The Court: Of course counsel will say that the method followed is bound to result in discrimination and exclusion.

Mr. Margolis: Let me say this, your Honor: I just want to at this point reply very briefly and suggest that the word "intentional" has several different meanings, including specific intent and general intent. I think that a lawyer ought to understand that. Also the rest of the case has to be read and the other cases that have been cited have to be read to understand in what sense the word "intentional" is used. I think that I will be able to demonstrate to the Court the sense in which it is used.

The Court: We will get to that point pretty soon, I assume.

(Testimony of William S. Robinson.)

Upon thinking a little bit further about this, I think perhaps this goes to the weight of this witness' testimony and all of his testimony. If you still insist upon having him express his opinion concerning this book, I will admit it, but I want to say to you now that it goes to the weight of his testimony and the entire testimony that he has given [522] in this case. If he has no better foundation for the conclusions that he is about to express, or you have asked him to express concerning this book, if he has no better foundation for the conclusions that he expressed otherwise, and you want him to assume that responsibility, I will admit it, counsel.

Mr. Margolis: I do not think that is a fair question. That is like asking, have you stopped beating your wife. I do not concede that I have been beating my wife. I do not concede, your Honor, that this testimony is to any extent limited. I do offer it but not with the limitation which your Honor imposes upon it.

The Court: I am saying that if you offer it I will admit it, but I am stating to you that I will receive it and it will go to the weight of his testimony.

Mr. Margolis: I want to say this again: The testimony was originally offered, and the offer still stands, and of course if your Honor wishes to limit it I cannot control the manner in which your Honor construes the weight he gives to the testimony, but I certainly do not agree to the limitation or the approach which your Honor takes. I simply make

(Testimony of William S. Robinson.)

an offer of that testimony just as it was made originally. I do not think that it is fair to place me in the position of saying, if you offer that testimony then I am going to do so-and-so.

The Court: I am not saying that. I am saying that I will receive it on that basis.

Mr. Margolis: I will certainly not offer it on that basis.

The Court: Pardon me, counsel. I have been endeavoring to follow this witness' testimony very, very closely for the two days that it has been given in the hope and expectation that I would receive something that would aid me in determining the immediate question and would also be of some guide in the matter of selecting juries. But here he says that he doesn't know anything about it and he can tell by merely looking at a name in a book what that person's economic status is.

Mr. Margolis: Let me ask your Honor this: I assume if you read a name in a book of Government employees that it will be possible to tell something about that person's earnings, is that correct, your Honor, because a person who is working for the Government, with the exception of one man doesn't make \$100,000 a year. You would learn something from the fact that that person's name, with respect to his earnings, was in that kind of a book.

The Court: I wouldn't be able to learn from reading his name in a book that he was in a different economic class or his income was on a higher economic level than fishermen.

(Testimony of William S. Robinson.)

Mr. Margolis: You would be able to tell what his earnings were within certain ranges. What this witness has said is that it has been scientifically demonstrated that the [524] presence of persons' names in social registers has a direct relationship to their income, that people don't get into the social registers if they make \$20 a week, for example. There are many people in the United States who make \$20 or \$25 or \$30 a week, but those people are not in social registers.

I think not only is the testimony proper and correct, but that any other conclusion is simply inescapable. I think any other conclusion is one which simply cannot be accepted. To think that anybody would get up before your Honor and say that in social registers people who make \$25 a week and who are drawing \$25 a week unemployment insurance are to be found, I think your Honor would find that statement pretty ridiculous, and it would be ridiculous.

The Court: Let's see. The basis of your argument is that the inclusion in here is the excusion of other classes, is that right?

Mr. Margolis: The inclusion in here is of a limited type of persons in the community, persons who within the cross-section might be perfectly competent and impartial jurors, but who when they are selected in a discriminatory manner do not give the kind of an impartial cross-section of the jury panel which is required. That is our contention. And I say again that for anybody even to think for a sec-

(Testimony of William S. Robinson.)

and that an unemployed person, that a worker, that a janitor, that for example a colored janitor down here in of these [526] buildings, is in that blue book is just ridiculous.

The Court: Has anybody said that?

Mr. Margolis: But what this witness has testified to is precisely along those lines. If your Honor agrees with my statement on the point, then I do not see how you can reach a conclusion that the witness' testimony is as ridiculous as your Honor apparently thinks it is. If your Honor agrees with me that it would be absolutely ridiculous for anybody to stand here and say that people who make \$20 a week are in that blue book, if your Honor agrees with that, then the witness is of course correct.

The Court: I haven't given any such indication at all, counsel.

Mr. Margolis: Of course you haven't. Then your Honor wouldn't do it.

The Court: I have indicated to you that I doubt this witness' ability to read a name, or her name, in a book with nothing but a name and address and the fact that they live in Bakersfield and have a telephone number, that he can state what economic class they are in.

Mr. Margolis: He can state. What the witness testified to was that he could state within what range of income they fell, that they fell above a certain range of income.

For example, all the witness would have to say would be that I am sure that that person is a mem-

(Testimony of William S. Robinson.)

ber of a family which [526] has an income of more than \$25 a week, and that would be completely consistent with the answer which he gave. There are people who do not have an income of \$25 a week, and I know many of them.

The Court: Counsel, this book is published in Los Angeles, at 3418 North Broadway, Los Angeles. I suppose that you could probably get the publisher of the book here and find out just how the people got in here. But I do not know that it is that important because the total number of names that went out of this book was 1680.

Mr. Margolis: That is of the names for which we have lists. There is also some testimony that the blue book may have been used earlier.

The Court: A number of years ago, and that he only got a few hundred names from it. There are 1680 names—say he got 400 at that time; that would be 2000 names—and according to the clerk's testimony they have all flowed back into the available file, that is, in something like 25,000 names.

Mr. Margolis: That is 1/12 to start with, just taking that figure.

The Court: 2000 is one-twelfth of 25,000?

Mr. Margolis: It is approximately one-twelfth, your Honor.

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [527]

(Testimony of William S. Robinson.)

Los Angeles, California, February 21, 1947;

2:00 o'Clock p.m.

The Court: Ex parte matters?

The Clerk: None, your Honor.

The Court: U. S. v Local 36.

Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Calverley: So stipulated.

The Court: Very well, Dr. Robinson was on the stand.

WILLIAM S. ROBINSON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Margolis:

Q. Doctor, I think before the recess there had been some mention of the name of Sedgwick, Deborah Coulter Sedgwick (Junor), which appears on page 304 of Defendants' Exhibit U. Aside from your general knowledge of what is contained in these books and the scientific studies that have been made of them, is there any internal evidence in the book which confirms your conclusion as the economic status of that person?

A. There is. Deborah Coulter Sedgwick's maiden name is given as Coulter, and if you will look, in the book under Coulter, on page 83, you will

(Testimony of William S. Robinson.)

find Coulter, Mr. and Mrs. Joel [528] Wright, and listed as living at the same address as Deborah Coulter Sedgwick, and you will find slightly lower on the page this notation: "Country residence: Coulter Ranch, Route 3, Box 714, Bakersfield.

In other words, these people, who all live at the same place, live in Bakersfield but they have a country residence as well.

The Court: That wasn't known to you when you answered the question before the noon recess, was it?

The Witness: That was not.

Mr. Margolis: I asked whether there was anything confirming it.

Mr. Calverley: I move to strike the answer on the ground that there is no foundation laid because that doesn't indicate that those people own that ranch or that this particular Deborah Coulter Sedgwick has any interest in it.

Q. (By Mr. Margolis): Is there any indication of ownership on this? A. Not on this.

Q. Did you obtain any information on that subject?

A. I did.

Q. What did you obtain?

A. I went to the public library and consulted the Bakersfield city directory.

Q. What did you find? [529]

A. It stated that Joel Wright Coulter is a rancher, owns a ranch.

The Court: That is to say, he owns a ranch or he is a rancher?

(Testimony of William S. Robinson.)

The Witness: It says ranch owner. And it says furthermore that he is a householder and owns this property at 2203 Seventeenth Street.

The Court: Do you know whether his farm is a large farm or just a potato patch?

The Witness: It means that she lives at the same place.

Mr. Calverley: Does it mean she owns any interest in it?

The Witness: Not at all.

Mr. Calverley: Then I move to strike the answer.

The Court: I will let the answer go in as his opinion.

Q. (By Mr. Margolis): Will you finish your answer? What does it mean?

A. It means to me that this is a person who is a rancher, but not a dirt rancher, certainly, as he lives in town, and I don't think he commutes to his ranch by subway so he must own an automobile capable of getting him there and back. In other words, the usual rancher does not live in town.

Q. He usually lives at the place where he works?

A. Yes.

There is a small bit of additional evidence—it would have to be verified but at least there are some probabilities [530] connected with it—the address is 2203 Seventeenth Street, which to me indicates that it is probably a corner house and corner houses are known to be considerably more expensive than that houses next door or in the center of the block.

The Court: Where?

(Testimony of William S. Robinson.)

The Witness: In any city. And if you want references again I will give them to you. Any method of selecting a sample of houses which gets corner houses more often is biased upward economically than those that are not corner houses.

The Court: Do you know where Seventeenth Street is in Bakersfield?

The Witness: I haven't the slightest idea, but as I said there are probabilities—and this would have to be verified, but I understand that in numbering houses in California you start the new hundreds at every street.

The Court: But you don't know where Seventeenth Street is?

The Witness: I haven't the slightest idea.

The Court: You don't know what the 2200 block would be like, whether or not that is over around in the manufacturing section or out towards the county hospital in Bakersfield?

The Witness: I haven't the slightest idea.

The Court: Or out in the oil fields?

The Witness: It might be, I suppose. [531]

The Court: Do you know what kind of a ranch they own?

The Witness: Not the slightest.

The Court: Do you know about the ranches in Bakersfield?

The Witness: I know that they can afford to own this house in town while operating a ranch. I know that that is highly unusual.

The Court: The wife couldn't be a school teacher and have to be in town?

(Testimony of William S. Robinson.)

The Witness: She would still belong to this family and I think this a high economic class family, and I think their attitudes would be the attitudes of the upper economic brackets.

The Court: Have you any way of telling whether or not the man of the house had ever worked as ranch hand, maybe saved his money and bought a farm?

The Witness: No, I haven't.

The Court: Do you think that that would affect his attitude or his capacity to be an impartial juror?

The Witness: We have gone into this before, and I don't think that it would affect his capacity to be an impartial juror. But I merely was able to put him more or less, at least to my satisfaction and with the classification which I have already given, in an economic class and that economic class is not, let's say, the lower third in the nation.

Q. (By Mr. Margolis): By the way, do your have any figures on the average income in the nation?

A. The average income for the nation, the median income, which is the proper average to use in the circumstances, has fluctuated but it is roughly \$1500 a year, which is roughly \$30 a week.

Q. What do you mean by median income as distinguished from average?

A. Half of the people have higher incomes than the medium income and half the people have lower incomes than the median income.

(Testimony of William S. Robinson.)

The Court: How can you tell that that is her maiden name? Can you tell that by looking in the back of the other Coulters?

A. I can tell by looking at the Coulter above and verifying the fact completely without question by finding if she is listed under Coulter in the front of the book as well. It was a guess, but you follow up guesses to get information.

Mr. Calverley: There is no indication, your Honor, that the ranch is or is not mortgaged.

The Witness: There is no indication whatever. Could I possibly claiming whether I know it is mortgaged or not?

Mr. Calverley: Yes, I think you could.

The Court: I think you are when you say that she is in [533] the upper economic group.

Q. By Mr. Margolis): Do you think that the poor farmer—let me ask you this—from a statistical standpoint, is there any reasonable probability that a poor farmer with a heavily mortgaged ranch maintains a city residence?

A. There is very small probability. I think any normal person would think there is a small probability that that is true.

Mr. Margolis: At this time, your Honor, I have here some records which we have received from the Registrar of Voters, giving Los Angeles city precincts and the Los Angeles county precincts, and I ask that they be marked in evidence.

(Testimony of William S. Robinson.)

The Court: Los Angeles County precincts is the subdivision. Yes. These will be marked in evidence.

Mr. Margolis: These figures on here I don't know what they mean.

The Court: Apparently somebody has revised them to February 10, 1947.

Mr. Margolis: Yes. We were informed by the city registrar that that is up to date as of February 10, 1947, and the revisions brought them up to date from formerly November [534] 1946. The changes are between November 1946 and February 1947.

The Court: Very well. Received in evidence.

The Clerk: JJ and KK in evidence.

Mr. Margolis: Which one is JJ, for the record?

The Clerk: Los Angeles city precincts is JJ; Los Angeles County precincts is KK.

(The documents referred to were received in evidence and marked Defendants' Exhibits JJ and KK respectively).

* * *

Q. (By Mr. Margolis): Dr. Robinson, I think we were discussing also this morning the question of numbering these precincts so that a selection could properly be made from them. With those lists in front of you, do you have any additional comments to make on that subject?

A. Yes. I think I might complete the numbering in at most an hour by myself with a pen.

Q. Will you tell us what method you would use?

(Testimony of William S. Robinson.)

A. Yes. The city precincts are numbered there.

The Court: You would just number that sheet there?

The Witness: I am sorry, I would not number the sheet.

The Court: You are speaking now in your answer of numbering these?

The Witness: Of numbering the precincts.

The Court: These big sheets here?

The Witness: No, I am talking about getting numbers for the different precincts from this.

If you will let me go on I think it will clarify itself.

The Court: All right.

The Witness: The city precincts are numbered from 1 to 3024, and with one exception, one qualification which I will come to in a moment, I would simply let those precincts stand as they are with their printed number.

The Court: I understand. If you are speaking about just giving a number to lists of precinct numbers on a sheet, that is quite a different proposition.

The Witness: That is all that is involved.

The Court: And number these big sheets here, of which there are 5894.

Q. (By Mr. Margolis): The numbers could be placed opposite these numbers and then you would have a reference? [536]

A. You would have a dictionary. The A's would have to be numbered individually because there are 9 A's, so let the numbers stand but the A's would have to be renumbered.

(Testimony of William S. Robinson.)

I would number these, and there are simple ways of doing this, so I would number the precincts.

The precincts could then be selected at random from a table of random numbers. I brought a copy of a table of random numbers with me which I brought from my home, which is approximately north of Pico and east of Sepulveda.

There are two stages in the proceedings that I envision. The first consists in picking, let's say, as many precincts as there are persons needed. You say that is roughly of the order of a thousand. Well, I would pick 1000 precincts from this list, using my random numbers, and this list would also serve as a dictionary telling me what precincts in Los Angeles city and in Los Angeles County to look at in that big book of sheets.

Then with a small sheet of random numbers in one hand I could very readily, using some kind of, say, manufactured key to put over the sheets that would number them automatically, they are spaced at equal intervals, I could then select randomly within each precinct one person.

That is all there is to it.

The Court: This sheet of random numbers. Exhibit V, that you put in evidence, I took it during the noon recess [537] and tried to work out some process, but how can there be any assurance that you will have in this table of random numbers—you would use all of these tables? You have 26 here.

(Testimony of William S. Robinson.)

The Witness: I would use one with four digits, unless there were repetitions of numbers in the set, and then you can either throw out the repetition or use it as you like.

The Court: How would you be sure that you would have a representation of all numbers less than 5894?

The Witness: Because I should have randomly picked from that list of numbers under 5000, and whatever it is. It is the randomness which insures the representativeness. In fact, it is the randomness which appears to me to be the definition of fairness in picking. Certainly it is the randomness which is the fairness in picking the jurors from the wheels.

The Court: And that method of randomness which you use in making surveys of public opinion?

The Witness: Quite so.

Q. (By Mr. Margolis): Now there is one other factor that I would like to ask you about—

The Court: By the way, that book you have there, for the purpose of the record, what is the title of it? Who is it published by?

The Witness: My random numbers? [538]

The Court: Yes.

The Witness: It is "Random Sampling Numbers," arranged by L. H. C. Trippett, Master of Science. It is a tract for computers, No. 15, published by the Department of Applied Statistics of the University of London, University College, Cambridge University Press, 1927.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): As I started to say, Doctor, there is one other factor that I wanted to ask you about in connection with the method of obtaining prospective jurors that the testimony shows has been used. The testimony shows that a number of questionnaires are sent out and that only part of those that are sent out are returned, and that there is no follow-up as to the questionnaires which are sent out but which weren't returned. One example that was given was that somewhere between 5000 and 6000 questionnaires were sent out and that of these 1800 were returned.

Even assuming that the original 5000 or 6000 questionnaires which were sent out were to persons selected in a perfectly scientific way to obtain a cross-section of the community, what would be the effect, in your opinion, of using just those that are returned without any follow-up on those that are not returned?

A. The fact would be to introduce a bias.

Q. Could you explain that and state upon what you base that? [539]

The Court: You mean a statistical bias?

The Witness: Lack of representativeness in the sample.

Q. (By Mr. Margolis): Will you say why, and state the basis upon which your conclusion is reached?

A. The basis upon which my conclusion is reached is a large number of studies, some of them conducted under my direction, all scientifically rep-

(Testimony of William S. Robinson.)

utable and, let's say, varifiable. A number of such studies were conducted by me at the Office of Radio Research in New York.

Q. What did these studies show?

A. They show that when you send out questionnaires in general if you don't follow up you get roughly one-third of your questionnaires back. What was the figure that was given here?

Q. 1800 out of 5000 or 6000.

The Court: You say when you don't send out questionnaires?

The Witness: When you send out questionnaires but you don't send follow-ups.

1800 out of how many, Mr. Margolis?

Mr. Margolis: Between 5000 and 6000.

The Witness: That is a third. Roughly you get a third back, and the third that you get back are biased economically. [540]

Q. (By Mr. Margolis): In what way?

A. They are not so much biased upwards and downwards or in the average as they are in being biased in coming solely or in the main from the group of proprietors, managers, and officials. They come also from clerical, sales and kindred persons, but they do not come from professional people ordinarily, they are under-represented in professional people, and they are greatly underrepresented in those lower on the scale than clerical. Craftsmen, foremen, domestic services, operatives and protective services are greatly underrated in questionnaire returns.

(Testimony of William S. Robinson.)

The Court: You are speaking generally now or of this particular sample?

The Witness: I am speaking generally. It has been done—I suppose studies of this sort have been made 40 or 50 times and the result has never failed to be forthcoming yet.

The Court: In other words, whether you are sending out 5000 questionnaires concerning soap, for example?

The Witness: Well, they sent out questionnaires on soap but I don't remember having done it myself.

The Court: You spoke about, when you were being qualified here, about sampling something for Du Pont. What was that, soap? [541]

The Witness: No. I was not sampling, in the first place; I was devising an experimental design.

The Court: What was it for?

The Witness: I did not send out any questionnaires.

The Court: What was it, soap?

The Witness: Women's slips, I think.

The Court: All right. Now if you had sent out 5000 questionnaires concerning women's slips, then you would get one-third back?

The Witness: Roughly, or you would probably get back fewer than that in that particular case.

The Court: In that particular case?

The Witness: Women do not respond as well as men, in other words.

(Testimony of William S. Robinson.)

The Court: Let us take something else. Let us take something that more men and women are interested in.

Mr. Margolis: Cigarettes?

The Court: There isn't a universal demand for cigarettes.

The Witness: Why don't you take something where you would tend to get a large return?

The Court: You name it.

The Witness: Suppose you are conducting a survey of opinion. People always like to give their opinions and there is a natural tendency to send their questionnaires back. [542]

The Court: I don't know. A lot of people might not want to express an opinion, or they might be so biased—there are a lot of things that prevent them from expressing an opinion if they might want to buy something.

The Witness: Biased persons always send back the questionnaires.

The Court: Let's take clothing.

The Witness: All right.

The Court: That is, whether people like wool or cotton clothing. Assume that you send out a questionnaire, and that that was the question you asked, do you like wool or cotton clothes, or shoes, to 5000 persons, your experience shows that you would get back a third.

The Witness: I doubt—I am not quibbling, but I would like to know whether that is all you want

(Testimony of William S. Robinson.)

on the questionnaire, or whether you are going to sell the questionnaire with a preamble and a reason for asking it, and so forth.

The Court: What would you suggest?

The Witness: There is a technique as to designing questionnaires.

The Court: I know, but in this questionnaire here they are just sent out stating that your name has been selected for jury service, that is all. Suppose you do not say anything else but that you have been picked as a person to express your opinion as to whether or not wool or cotton is [543] best suited to make clothing out of.

The Witness: You will get 25 or maybe 30 per cent if you are lucky.

The Court: That is, you would get back less than a third, in your judgment?

The Witness: That is right.

The Court: And of that one-third they would be divided into the 1940 census, into the 11 classifications, they would come back about how? Would you state that again, please?

The Witness: They would come back, you would have extremely few professionals or wives of professionals answering your questionnaire. Assuming that you had sent them out in the correct proportions.

The Court: All right. It was a random selection.

The Witness: All right. Then the answers of professional people—well, I will put it in this way:

(Testimony of William S. Robinson.)

Those professional people who get the questionnaire would tend not to return it. Those business people who get the questionnaire would be more likely to return it, and a larger percentage of them would return it, a more large percentage.

Clerical people who get it, a smaller percentage would return it, but still larger than professional.

But you would be surprised how remarkably it comes out. Laboring people to whom you send it would almost never return it. Machine operators, domestic service workers, they would return it rather sparsely. [544]

The Court: Craftsmen, foremen and kindred workers, would they return it?

The Witness? Not as well as clerical and sales.

The Court: Operatives and kindred workers?

The Witness: About as well as craftsmen.

The Court: Domestic workers?

The Witness: Less able.

The Court: Protective and service workers?

The Witness: Policemen, they are so few it makes no difference anyway.

The Court: Service workers, domestic and protective?

The Witness: All right. Service workers all told, domestic and protective would tend not to return it. Domestics don't.

The Court: I am just reading your headings here.

The Witness: All right.

The Court: Farm laborers.

(Testimony of William S. Robinson.)

The Witness: Farm laborers would almost not at all. In fact, you wouldn't be able to get the questionnaire to them. They are itinerant in the main.

The Court: Laborers exclusive of farm?

The Witness: They would return it very sparsely, even if you would get the questionnaires to them.

The Court: In about the same proportion, would you say, [545] as the 1800 came back' here in the 5000 questionnaires that were sent to the jury?

The Witness: No, I don't mean that all of these groups would return it; roughly one-third of the questionnaires would be returned. I don't mean of professional people that one-third would send the questionnaires back or one-third of the domestics.

The Court: I understand.

The Witness: But all told about one-third would send them back, and that one-third would be mostly from the clerical and sales workers, proprietors, managers and officials.

The Court: So that assume that the 5000 names which you picked on this wool and cotton question were selected randomly, when you finally got your questionnaires back to tabulate them you would have a large percentage of the classes you have indicated?

The Witness: A larger percentage of proprietors, managers and officials, and probably also of clerical and sales.

The Court: That might account, might it not, for some of the discrepancies in your final figures

(Testimony of William S. Robinson.)

here on these questionnaires in connection with the jury, wouldn't it?

The Witness: It might account for some of it.

The Court: I see. By the way, do you account for that discrepancy in answering that, Doctor?

The Witness: I don't know. I very often wondered about [546] it. It is partly, I think, a matter of—well, this is the sort of thing I do when I ask myself that question—proprietors, managers and officials are people who, when they get mail, have it put on their desk and it is opened for them, and they see it and it is answered and everything is nice and routine about it. If a laborer gets—

The Court: You mean all of them do?

The Witness: No, but my observation is that people of that sort are much more tidy than I am, for example. And I suppose that people of that sort very often get their mail at their business, because you need addresses, you see, to which to mail these. And craftsmen, operatives, domestic service workers—not domestic, laborers—I should imagine get their mail at home. I know there is a greater likelihood of my answering mail when I get it at my office than if I get it at my home, for one thing. I mean that is just one reason. I can think of 20 reasons.

The Court: You have never made any study of the reasons?

The Witness: There have been studies made.

The Court: But studies on sociology and statistics, you have never made any study as to why

(Testimony of William S. Robinson.)

it is that laborers and people like that do not respond to questionnaires?

The Witness: No, because the reasons of that kind are not so important as another and much better reason for this [547] lack of reliability in that you never do get a random sample of names, or rarely a random sample, to send your questionnaires to originally without too much labor for the people who send questionnaires.

The Court: I do not understand that answer.

The Witness: People who send questionnaires of this kind are, in the main, advertising agencies, consumer research agencies, commercial agencies of one sort or another. Now they are interested in a quick return on their money. They want results but they don't care particularly if they are too good. Generally they are using the information they get to sell services to their clients. Consequently they will take any available list, such as—and usually it amounts to—the telephone book or the city directory. They will select some names from it and send those cards out.

The list of the people to whom they send the postcards are already so biased that the returns, that is, the differential tendency of different economic groups to return the questionnaires, that it doesn't make any difference.

The Court: You mean even the laborers who do have telephones?

The Witness: There are not sufficient of them so as to make any difference whether a laborer tends

(Testimony of William S. Robinson.)

to return the questionnaire or not. That is a practical reason why the matter has not been studied, as to why different types of people don't return them. [548]

The Court: Well, Doctor, the matter of influencing new foods, in food packages on the market, which is constantly being done, don't those people endeavor to find out the attitudes or desires of what you ascribe as the lower economic groups, people who weren't listed in the telephone book?

The Witness: They are not particularly concerned with it. I happen to have done a lot of that work, and I know.

The Court: Why?

The Witness: Well because they can sell—I don't know why but I know that they are not.

The Court: Is the appetite of the person using pancake flour different whether he lives in Beverly Hills or south of Pico and east of Hoover?

The Witness: It is a well-known fact that the poor person has a relatively little choice of what he can buy compared to the person with more money, for one thing.

The Court: Well, as a matter of fact, packages of pancake flour, of which there are considerable sold, are sold to everybody.

Mr. Margolis: It is a pretty expensive item on a poor man's table.

The Witness: I know as a fact that people—all right, J. Walter Thompson Company, or any of the advertising agencies—are concerned mainly with

(Testimony of William S. Robinson.)

finding the reaction of [549] people in the upper brackets and are not concerned with laborers in particular.

The Court: I was just wondering if you had made any scientific study of that or were up to this point satisfied with the reasons that have occurred to you.

The Witness: The reasons are immaterial. I would never use a questionnaire myself. What militates against them is the fact that they don't return them. It doesn't matter to me what causes it if they don't return it.

Q. (By Mr. Margolis): Is there any connection—

A. Why should I try to find out? You can't change people.

The Court: In other words, you consider it bias because they don't return it?

The Witness: That is an objective fact. It is objectively biased.

Q. (By Mr. Margolis): Dr. Robinson, is there any connection between the testimony which you have been giving and the facts you have given in your testimony, the opinions that you have been giving in your testimony, and the reliability of post-card polls?

A. Well, the connection is that those card polls, as is rapidly learned by people who try to forecast elections with them, are notoriously unreliable. [550]

Q. Just one or two more questions.

(Testimony of William S. Robinson.)

The Court: Well, they are getting a little worn out. That is one of the reasons they are getting unreliable, isn't it?

The Witness: Why should they wear out?

Q. (By Mr. Margolis): Have they ever been reliable?

A. Yes. Postcard polls were reliable before 1932, that is, nationwide political polls based on postcards or sending in clipped coupons were reliable, before the economic conflict, let's say, became apparent in the Presidential elections in the United States. I mean before the depression. The Literary Digest did fine before the depression. The instant economics came into it, postcard polls went out because they were economically biased in their returns.

Q. Now, Doctor you computed probabilities with regard to the exhibits which are in evidence here—I don't remember the exact numbers but all of the exhibits——

The Court: They begin with W-2 and run to II.

The Clerk: Not in evidence.

Mr. Margolis: Which are in for identification only; yes.

Q. You also testified concerning the probability with relation to some figures which I gave you separately and which I stated I had taken out of the case of *Smith v Texas*. [551]

A. That is correct.

Q. I want to know whether there was any difference in the method that you used in the two instances.

(Testimony of William S. Robinson.)

A. The method was precisely the same in the two instances.

Q. Now this last question, Doctor: At one stage of the proceedings you stated that you had never seen a group of sampling, or a selection, that was so far from a cross-section as the selection with which you were dealing here, that you were surprised at it.

A. That is correct.

Q. Now that you know the sources from which these questionnaires were obtained, the method of obtaining these persons, are you still surprised?

A. No, I am not surprised. In fact, it would be mathematically impossible to get a cross-section with that procedure.

Mr. Margolis: Cross examine.

* * *

Cross Examination

By Mr. Calverley:

Q. Dr. Robinson, I believe you testified in the beginning [552] of your testimony, or near the beginning of it, in connection with your testimony about that time you gave the illustration of placing a certain number of black and white marbles in a drum and drawing them out at random as a procedure similar to the modus operandi that is used here, is that right?

A. I don't know that I compared it to any other process. I was trying to give an idea of what random selection from an urn or drum consisted in.

(Testimony of William S. Robinson.)

Q. And from the numbers, if you know how many marbles are placed in the drum and what colors they are, you can predict within a certain percentage of what ones will be drawn out were they picked out in that manner, is that right?

A. That is correct.

The Court: That is assuming all of the marbles to be of the same weight and size?

Mr. Calverley: That is right.

The Court: Is that correct?

The Witness: That is correct.

Q. (By Mr. Calverley): Now of course that would be dependent upon the fact that the marbles were distinguishable as between black and white?

A. That is correct.

Q. Now if an individual was picking out those marbles [553] and he was to determine whether or not they were black and white, if he had defective vision in determining color, that would make that testimony unreliable, wouldn't it?

A. I believe that the distinction between black and white is not one which color-blindedness makes any difference to.

Q. Supposing the individual has a type of defect in his vision whereas he cannot distinguish between the two with any accuracy.

A. I am afraid I can't conceive of such a situation. You mean a blind man?

(Testimony of William S. Robinson.)

Q. Supposing some of these marbles were gray in color and it is a matter of opinion whether you call them black or white.

A. My marbles were black and white.

Q. I am assuming the situation in which a number of white marbles, a number of black marbles and a number of gray marbles were put in, and you had to compute from that type of a mixture of marbles, knowing how many were put in and [554] that the gray marbles would have to be distinguished as between black and white, could you conduct such an experiment?

A. That is not—it could be conducted, but it is not to within probabilities.

Q. It would be extremely unreliable because you couldn't determine which were black and which were white, at least as to some of them?

A. I think it would not only be unreliable, it would be silly.

Q. All right. In picking out this representative sample of questionnaires that you have testified to here, that sample consists of approximately a thousand, doesn't it?

A. Which sample?

Q. All of those exhibits which are in front of you which constitute the questionnaires of prospective jurors which are in evidence here and from which the individuals under your supervision made their computation.

A. I am not sure how many there are in it; I think it is a matter of record or I can count them, if you like.

(Testimony of William S. Robinson.)

The Court: It is about a thousand.

The Witness: All right. I just don't know.

Q. (By Mr. Calverley): Now who determined from those 1000 questionnaires what the prospective juror's occupation was from those questionnaires?

A. Some clerks did so under my direction.

Q. How many? A. In the main, one.

Q. Who was he? A. Mr. Jack Tenner.

Q. And how many others?

A. I think he did most of it. I am not sure.

Q. All right.

A. I know that my directions were given to him.

Q. Do you know of any others who did it?

A. No.

Q. Do you know whether there were two or five more or ten more? A. No.

Q. Did he tell you how many were working under his direction? A. No.

Q. Who is Mr. Tenner?

A. An employee of Katz, Gallagher & Margolis.

Q. Do you know whether or not he is associated with any labor union or what class of society he is in?

A. I haven't the slightest idea.

Q. Do you know whether or not he had any prior experience in statistical work of any sort?

A. I believe that he had not. [556]

Q. Now I believe you testified that as to the grand jury, prospective grand jury panel of February 1946, that you had instructed him to operate from those cards by telephone calls, is that right?

(Testimony of William S. Robinson.)

A. Not exclusively by telephone calls. If you will recall, first the city directory and then—what?

Q. Telephone calls?

A. All right. That was the last resort.

Q. Do you know how many calls he made in connection with getting the information which is the basis of your computation?

A. No, but I can find out if you want me to consult the yellow sheets. The source of the information for each individual is listed.

The Court: Do you want him to do that?

Mr. Calverley: I think it is a good idea, your Honor, if they are available there.

* * *

Q. (By Mr. Calverley): Here is X-1 to——

A. Shall we take one at random? [557]

Q. You might just take one at random.

A. Here is one at random.

Q. W-1?

A. W-1. Do you want me to give the name of the individual?

Q. Yes, you might give it.

A. Bernice Fitzmier Baumgardt, and the jury commissioner's record says she is a housewife. That is the source of the information.

The voters' register says that in 1946 Howard D., her husband, was a dentist. Therefore she was classified under dentists and ultimately got into the professional and semi-professional group.

You will find similar kind of things for each one of these.

(Testimony of William S. Robinson.)

Q. You haven't made any computation as to how many or how much of this information was obtained by telephone call and how much was obtained from the city directory, is that right?

A. No, but a small proportion was. The questionnaires are relatively complete. The only important groups of people for whom information was collected by telephone was housewives and retired. In the main, information on employed people, their record is on the questionnaire.

Q. Did you examine any substantial portion of these [558] questionnaires to determine whether or not the answer to question No. 5 was complete or satisfactory?

A. The answer was copied for my benefit on the sheets and I looked at those answers as copied.

The Court: You didn't look at the questionnaires yourself, did you?

The Witness: No. I looked at a few but not systematically at all. The words written were copied on the sheets.

Q. (By Mr. Calverley): In connection with those telephone calls, you do not know how Mr. Tenner, or whoever the clerks were who worked with him, whom they talked to on the other end of the line, do you?

A. No, not in any specific case.

Q. They may have talked to a 10-year-old boy, as far as you know?

A. They might have talked to a 2-year-old boy, as far as I know.

(Testimony of William S. Robinson.)

Q. You just took their word for what took place, what information they received?

The Court: You don't have any statistics on the number of 2-year-old children that can answer the telephone, do you?

The Witness: I do know this, I do know that we have these results simply to save the Court's time. We have these results given by employed persons and then we have them separated [559] given for the persons where we needed to go to supplementary courses for information, and the results are the same.

I am perfectly willing to go ahead and answer these questions, but as I have told you already the employed people in a great majority of the cases gave their occupation on the questionnaire and they were taken directly from that. The rest of the people are but a drop in the bucket and in any case two series show exactly the same results.

Q. (By Mr. Calverley): You have testified that you are a professor of sociology.

A. An assistant professor.

Q. Assistant professor of sociology?

A. Yes.

The Court: Whereabouts, by the way?

The Witness: University of California at Los Angeles.

* * *

Q. (By Mr. Calverley): In connection with your studies in sociology, you have studied human psychology, is that true?

A. That is correct.

(Testimony of William S. Robinson.)

Q. Have you observed in connection with your studies any tendency on the part of human beings to exaggerate the type of employment that they are engaged in when they are required to answer it in one or two words? [560]

A. Not particularly, especially on official records from some official agency of the Government.

Q. Have you observed a tendency, let us say, of a stenographer who works in a bank calling herself a banker?

A. I have never observed that; no.

Q. Assuming that an answer to one of those questionnaires, that the answer to question No. 5 was "telephone employee." Where would you class such a person.

A. We would get more information or classify it as unknown.

Q. Suppose he says "works for Southern Pacific?"

A. We wouldn't know whether he was a vice president or a locomotive engineer and we would try to find out or else classify him as unknown. That gives the industry but not his occupation.

Q. Supposing a person put down "artist?"

A. We would classify him under professional and semi-professional as an artist.

Q. He might be a tonsorial artist though, is that true?

A. I doubt it. He would say he was a barber. Tonsorial artist is only a phrase in situations of this sort, in courtrooms.

(Testimony of William S. Robinson.)

Q. Now referring to the summary of occupations of September 1946 petit jurors according to classification utilized in 1940 census—— [561]

A. If you are going to question me on that, may I have it?

Q. I believe there are a number of them before you.

A. Excuse me. Summary of occupations of February 1946 grand jurors.

Q. Of the September 1946 petit jurors.

The Court: That is AA-2.

The Witness: I have it here.

Q. (By Mr. Calverley): Now with reference to Class A, that is professional and semi-professional workers, can say as to that classification whether or not members of labor unions are represented in that?

A. I should think that there are very likely members of labor unions in the professional and semi-professional classification. I don't know whether there is a labor union for veterinarians or not.

The Court: There is one for actors though?

The Witness: But there certainly should be some. There are for designers, draftsmen, actors, artists, authors also.

The Court: Chemists, assayers and metallurgists?

The Witness: There should be some labor union members in that class.

The Court: Are there any for college presidents, professors and instructors? [562]

(Testimony of William S. Robinson.)

The Witness: Yes, there is at least one union.

The Court: Civil engineers?

The Witness: Yes.

The Court: Electrical engineers?

The Witness: I think so.

The Court: Mechanical engineers?

The Witness: I am not sure.

The Court: Technical engineers?

The Witness: I am not sure.

* * *

The Court: Musicians and music teachers?

The Witness: They certainly have a union.

The Court: Osteopaths?

The Witness: I don't know about the osteopathic union.

* * *

The Court: Physicians and surgeons?

The Witness: They have definitely a union.

The Court: Social and welfare workers?

The Witness: Probably they don't, but I am not sure. [563]

The Court: Teachers?

The Witness: Teachers have a union.

The Court: Trained nurses and student nurses?

The Witness: Well, I think they do.

The Court: Veterinarians?

The Witness: I have already indicated I don't know that, but I suppose there is a veterinarians' society.

(Testimony of William S. Robinson.)

The Court: Other professional workers. Would that be people working for these people?

The Witness: I suppose so.

The Court: Then there would likely be unions there among them?

The Witness: I am willing to admit that there are very likely to be large numbers of union members among them.

The Court: Let's go down the list. Dancers, showmen and athletes?

The Witness: I think there are unions.

The Court: Designers and draftsmen.

The Witness: I am certain there are.

The Court: Surveyors.

The Witness: I don't know specifically as to a surveyors' union, but probably there are some surveyors who are union members.

The Court: Other semi-professional workers.

The Witness: Undoubtedly there are union workers there. [564]

That classification is not relevant to this one, I am afraid.

The Court: Well, semi-professional occupations as given in this Dictionary of Occupational Titles that I referred to some time ago, put out by the Department of Labor—and incidentally while they list 29,000 occupations there are only 7000 of them catalogued or key-numbered here.

Do you mean to say that the census wouldn't have followed that?

(Testimony of William S. Robinson.)

The Witness: I mean just that. It may in some classifications and subclassifications agree with that, and may not. It is a matter to be determined simply by comparison each time. That is for the use of the United States Employment Service.

The Court: Well, they have semi-professional workers here. What were included in the census classification? For instance, they have aviators.

The Witness: Aviators are semi-professionals.

The Court: They have airplane pilot, aviator, instructor, and they have unions for those?

The Witness: Oh, yes.

The Court: Decorators and window dressers?

The Witness: I don't know whether there is a window dressers' union or not.

The Court: Color experts and interior decorators, commercial artists, dancers and chorus girls, designers, laboratory technicians, draftsmen. [565]

The Witness: You have some of them already.

The Court: Cameramen, radio operators and the like are included in this book under that. Were they included by the census, do you know?

The Witness: In the main they would be in this group also; yes.

The Court: So that there are unions for all of those.

The Witness: Yes, they are:

The Court: So that under A, your testimony is that there are unions for everything except architects, clergymen, college professors——

(Testimony of William S. Robinson.)

The Witness: I have not testified to that fact. Where I have known I have suggested it.

The Court: You don't know of any union for architects?

The Witness: That is right. There is the American Institute of Architects. Do you want to consider them as a union?

The Court: I don't know. It is what your opinion is now, whether you consider it a union or not. Do you consider it a union?

The Witness: I consider the professional societies a union. But this is a court. I don't know what the legal definition would be.

The Court: What the nature of the union would be or not? [566]

The Witness: If the American Medical Association is a union, so is the American Institute of Architects.

The Court: Then there would be unions for everything except perhaps the clergymen.

The Witness: That is right. They have synods which are unions, I suppose.

Q. (By Mr. Calverley): Referring now to Class C—

A. Are we going to leave out B?

The Court: Farmers and farm managers.

Q. (By Mr. Calverley): I will make inquiry as to B, farmers and farm managers. I don't know of any unions in connection with that group myself. Do you?

Mr. Margolis: The Associated Farmers.

(Testimony of William S. Robinson.)

The Witness: There is the farmers' union, isn't there?

The Court: Yes, there is a farmers' union.

Q. (By Mr. Calverley): Referring to Class C, there seems to be quite a few union groups there.

A. I think you will find union groups scattered almost completely throughout every one of those specific occupations, and in fact rather than waste time I am quite willing to grant it. [567]

* * *

Q. (By Mr. Calverley): Referring to Class C, are there a number in that group that are members of labor unions?

A. There seem to be; yes.

The Court: Let's take them specifically.

Conductors, railroad?

The Witness: Yes.

The Court: Postmaster and miscellaneous Government officials?

The Witness: I don't think so, unless the Government is a union.

The Court: Other specified managers and officials? You don't know what that breakdown included in the census, do you?

The Witness: No.

The Court: Proprietors, managers, and officials, mining, construction, manufacturing, do you know about that?

The Witness: I shouldn't believe that proprietors in the main would be members of unions. I suppose managers might. [568]

(Testimony of William S. Robinson.)

The Court: Managers of eating and drinking places, retail trade, finance, insurance and real estate?

The Witness: Well, managers, as I say, I believe might be union members, and officials also.

The Court: Business and repair services, personal services, what did that breakdown include in the census, do you know?

Mr. Margolis: I think, your Honor, if you want to get some accurate information on this we can get the Department of Labor Monthly Review, which will give you—I don't think that this witness claims to know all of the trade unions, where as the Department of Labor does have it.

The Witness: I just stipulated that I don't.

Mr. Margolis: The Monthly Review will give us accurate pictures, if that is what you want.

The Witness: If you insist on my guessing, I am perfectly willing to guess, but I am telling you that I am guessing.

The Court: This is a cross examination. Counsel is entitled to pursue whatever line of inquiry he desires.

The Witness: Then my answer is I don't know.

Mr. Margolis: If your Honor please, I am not placing this as an objection, I am merely making a suggestion. If counsel wishes to take advantage of it, he may. [569]

(Testimony of William S. Robinson.)

Q. (By Mr. Calverley): Dr. Robinson, in all of the 11 major headings or major classes of prospective jurors, or rather types of employment or classes of economic groups which have been included in your sample, would you say that labor unions are represented in all of those classes?

A. I think so except I am not sure about domestic service workers.

Q. Well, would you say that this method of selection of prospective jurors could be a good or a fair one or a poor one in so far as members of the labor unions are concerned?

A. Which method of selection?

Q. That was employed here in this district by the jury commissioner and the clerk.

A. No, I would not say that it would represent proportionately or representatively membership in labor unions.

Q. Well, from your examination you couldn't tell that, could you?

A. I can say that it would not.

Q. But you don't know how accurate or how good it would be?

A. Well, I do.

Q. What would you say in that regard?

A. If I might be allowed a small preamble, my reason for classifying individuals in these occupational groups, I [571] think I stated before was not because I wanted to know how many there were in the different occupations but because membership

(Testimony of William S. Robinson.)

in those occupational groups related to social and economic attitudes and particularly attitudes about labor unions.

The Court: Now answer the question. You said that is the preamble.

The Witness: It has been established, I think, or if you assume that it has been established, that these groups are disproportionately represented in the panels and juries, then there is additional evidence which would show that opinions as to labor unions are not correctly represented, and so forth.

* * *

Q. We are not assuming that there has been any incorrect or inadequate system here employed, but the mere fact that one group, economic group is overweighted in the selection system that wouldn't mean that there was a scarcity of labor union members where you have labor union members in that particular group to a great extent.

A. It might mean it.

Mr. Margolis: Just a moment. I object to that as assuming facts not in evidence. For example, the largest group here is proprietors, managers and officials.

The Court: This is cross examination. [572]

Mr. Margolis: I object on the ground the question assumes facts not in evidence. There is an assumption in the question, your Honor, that to a great extent proprietors, managers and officials are members of labor unions. I think that fact is not in evidence.

(Testimony of William S. Robinson.)

The Court: The objection is overruled. Read the question again.

* * *

The Witness: If you have labor union members in that group to a great extent, if it is, let's say, a majority or a great proportion of them are labor union members, and a great proportion of other groups are not labor union members, or if the proportions in the two groups are different in their labor union membership, then there would be a disproportion in the representation of the labor union membership in the group selected, if that can possibly make sense.

Q. (By Mr. Calverley): I notice that in Class D, referring to classification [573] 8, telegraph operators; 12, hucksters and peddlers and 13, newsboys, there are people, are there not, in the classifications commencing with D and continuing to K inclusive in the lower income brackets?

A. There are people in D and lower classifications in the lower income brackets.

Q. In other words, aren't people in the lower income brackets included in other classifications than K?

A. Oh, yes. What is K?

Q. That is laborers except farm and mine, which include fishermen.

A. Yes. In making this list, so as to have it progress from A to K in two respects, in economic or, let's say, in income, if you like, or more particularly economic status, and in social status as

(Testimony of William S. Robinson.)

well, and in general the progression is downward from A to K. Is that what you want to know?

Q. That answers the question.

You testified that people in the upper income brackets have certain attitudes. What do you mean by that?

A. I will quote you a result, let's say, from the Fortune poll which classifies people by their levels as given here. It groups the population of the United States, or rather the sample, which is a good sample, into two classes, professional and business, and that means our classes A and C, that is, professional and semi-professional workers, and [574] proprietors, managers and officials, and then it has a second class, which is the remainder of all those people except farmers, which are excluded from this particular tabulation.

In February of 1944, in the business and professional class, that is, classes A and C, 65 per cent of that class thought that labor unions had "gone far enough and ought to be curbed."

The percentage thinking the same thing in the remainder, that is, the so-called wage earning class, in that class 32.2 per cent of the persons thought that unions had "gone far enough and ought to be curbed."

That is an example of what I mean when I say that the people in these different economic classes have different social attitudes.

Q. Are you familiar with the method that was used in the Fortune poll?

(Testimony of William S. Robinson.)

A. I am, and I am familiar with the policy of Fortune Magazine which might not be called favorable to labor unions.

Q. Now is it recognized in sociology that there are certain attitudes based upon religion in the community?

A. That is true. Religion is one of what is called the background factors, or a general determinator of one's attitudes.

Economic status is another. Even age is one. There are a number of others as well. [575]

May I add another sentence?

Q. Yes.

A. By determiners, it is not meant that these are cogs; it is meant if you find people of different religious and different economic levels you find different attitudes among them, that is all.

Q. You testified that this method of selection employed here in the District Court in obtaining the names of prospective jurors was not conducive to obtaining a cross-section of the community, is that right?

A. That is right.

Q. What do you mean by a cross-section of the community?

A. I mean a sample or a group of picked persons in which the proportions of the different occupations and, let's say, religions or everything else, should be represented, let's say, within random errors, or let's say adequately represented, in ordinary terminology. A miniature cross-section in

(Testimony of William S. Robinson.)

which there may be some discrepancy between the picked group and the group from which it is supposed to be picked, but not glaring, consistent discrepancies, and particularly discrepancies which are persistent in regard to what a statistician would call Chi and which would tend to overemphasize one group and tend to underestimate another group over and over again. [576]

Q. Do you think it would be possible to obtain a cross-section of a community such as this with a population of over 3½ millions and give consideration to the economic groups that are contained in the summaries which are marked for identification here in the 11 major economic groups and give consideration to these religious groups that I shall now mention: Roman Catholics, Methodists, Presbyterians, Congregationalists, members of the United Brethren Church, Christian Scientists, Jews, both Orthodox and Unorthodox, Jehovah's Witnesses, Baptists, members of the Church of the Four-Square Gospel, Universalists, Unitarians, Seventh Day Adventists, Lutherans and Russian Molokans?

A. I do.

Q. Do you think that you could devise a system which would give a representative group of the economic classifications that you have mentioned, those religious classifications and these, what we may term social classifications or semi-political: Benevolent and Protective Order of Elks, Independent Order of Odd Fellows, Loyal Order of Moose, Masonic orders, Knights of Columbus, B'Nai B'Rith, Society

(Testimony of William S. Robinson.)

for the Advancement of Colored People, Daughters of the American Revolution, Veterans of Foreign Wars, American Legion, American Veterans of World War II, Reserve Officers of the Naval Services, Alumni Association of the University of Southern California and the Alumni Association of the University of California? [577]

A. I do.

Q. Do you think you could devise a system that would represent a cross-section of this community including the economic, religious, social groups that I have just mentioned, and also include: Republicans, Democrats, Prohibitionists and Communists?

A. I do. And the stipulation always is that these are chosen from an available list such as the list of the voters' registry, which I take it is assumed in all this.

The Court: Is the voters' register assumed in all this to be the basis of your questions?

Mr. Calverley: No, your Honor. I am asking him what method he would use to obtain all of these.

The Court: You are asking him whether or not he could devise a method?

Mr. Calverley: That is right. I am not assuming that the voters' register is necessarily a good test. He said it was faulty when he originally took the stand.

The Witness: It is the best that is available.

Q. (By Mr. Calverley): While we are on that question——

(Testimony of William S. Robinson.)

A. May I say one more thing, because I am not trying to hedge.

Q. That is all right. [578]

A. There is another question, that of practicality, which is involved to me. I could do these, I could get these if you would give me sufficient help and a field force to do it with, but I don't think it would be economical.

The Court: Do you think you could do it if you were a jury commissioner?

The Witness: No, I couldn't.

The Court: And had to do it in your spare time and were allowed only \$15 every six months?

The Witness: No.

The Court: And also were a clerk of a multiple court understaffed at present?

The Witness: I have to appear to hedge again. What is required, if you can use the voters' register, and it is an empirical matter to determine how representative the voters' register is, how representative it is with respect to religion, race, political preference, education or anything else that you like; it is an empirical matter to be determined in each case and could be determined with relatively little expense, though it might take some time. But on those properties of individuals for which the voters' register is a good source, the clerk could do it.

Now I don't know, and it is an empirical matter, just how far off the voters' register is on each one of these things. I know that it is better than any other available [579] list, but if you are talking now

(Testimony of William S. Robinson.)

about practically picking a group that will represent all of those things, that means to me picking it from voters' registry. It would be a matter for me to investigate myself to determine which, for those criteria of classification you have given me, religion, age, sex, race, certain political parties, that would be all right when picked from the voters' register. It is obvious there, or at least if not obvious you could make a good case for it but, as I say, I don't have the information, specifically detailed information, to answer those questions, if you are asking for the answers of a practical man who is going to pick on \$15 a year, let's say, a list of jurors.

The Court: Before you get to the question, let's pursue your inquiry further and include the different nationality groups.

The Witness: I was going to add some, your Honor.

Mr. Calverley: I was going to do that, your Honor.

The Court: Let's do that before we get off on the voters' register.

The Witness: Then let's go back to——

The Court: Just a moment.

Q. (By Mr. Calverley): Dr. Robinson, it is recognized in sociology, is it not, that there are various nationality groups and particularly in large communities? A. That is correct. [580]

Q. That have political and social significance. Isn't that true? A. That is true.

(Testimony of William S. Robinson.)

Q. And I think you could devise a system that would include all the groups that I have heretofore mentioned and would include Irish-Americans, German-Americans, Franco-Americans, Italian-Americans, Polish-Americans, Spanish-Americans, Mexican-Americans, Hungarian-Americans, Czecho-Slovakian - Americans, Russo - Americans, Chinese-Americans, Japanese-Americans, Armenian-Americans, and also include Chinese and Indians.

The Court: And Mexican-Americans.

Mr. Calverley: I mentioned them.

The Witness: I do, and I have done so in a comparable situation.

Q. (By Mr. Calverley): Do you think you could also include in that system a system that would result in a fair cross-section of this community by also including this factor, and that is the geographical factor and include the following communities: Glendale, Pasadena, Long Beach, Maywood, Lynwood, Huntington Park, West Los Angeles, Santa Monica, Chatsworth, Downey, Pomona, Beverly Hills, Torrance, Inglewood, Culver City, Burbank, Arcadia, Walnut Park, Ocean Park, San Marino, San Gabriel, [581] Manhattan Beach, Redondo Beach, San Pedro and Alhambra?

A. I do. And furthermore any method which would give representation on the other factors that you have mentioned would necessarily involve geographical positions as it is essential before determining so.

(Testimony of William S. Robinson.)

I might add, what you have asked of me has been asked of the political pollsters and has been done by the political pollsters who are still surviving to this day.

Q. Well, now you couldn't—

A. For the United States as a whole.

Q. You couldn't get any grand jury of 23 persons that would represent all of those elements, could you? A. That is true.

Q. You could not do that?

A. That is true.

Q. And what would be the probability of ever getting a grand jury that represented all of these groups that I mentioned?

A. That is a question I can't answer because I would be glad to tell you why I can't if you want to know.

Q. Yes. I would be glad to know.

A. Obviously no 23 people can represent so many subcategories, the number of subcategories of different kinds of people which are involved in your lists, I suppose, in the millions, because if you give me nine divisions for religion, [582] let's say, and four divisions for education—which you didn't give but which ought to be included—then that means 36 subdivisions of both properties together. When you get through multiplying nine by four, by the number of categories in each of those major properties which you gave me, you would have a very number. So it is obvious that 23 people can't be scattered over a million or two or three categories

(Testimony of William S. Robinson.)

and fit into each one. What is required is not that they should represent but that they should be randomly selected from those categories, the millions, so that each person in each category shall have a chance of being included in any grand jury that is picked. So that the method of picking shall not exclude, shall not make it impossible, for a certain kind of person to get into the grand jury. That is all that is required.

* * *

The Court: Can I count on that as being the law that the Supreme Court is finally going to agree on?

The Witness: I am a statistician, not a lawyer, and I am telling you what is required for randomness or representativeness in a method of picking a sample from a population. Please don't ever make the mistake of assuming that I know anything about law. I know nothing whatever. I am only a statistician, as well as being a Democrat, but apart from that I am a statistician. [583]

Q. (By Mr. Calverley): You used the term "variability of different distribution." What did you mean by that?

A. I think I was referring to—I am not sure, I think I was talking about—oh, I think that I had been asked the question of whether or not there was more variation among the ages, let's say, than among the races or among some other properties or set of properties in different regions or communities. I think the question was something of this

(Testimony of William S. Robinson.)

sort, whether there was more variation in the ages in Los Angeles County than there was in the occupations in Los Angeles County. I think that is where I used the term in describing the question.

Q. Does that term mean, in trying to get a cross-section of all of these various groups, that you would have variations interspersed throughout your computations? In other words, you might have rich Catholics, poor Catholics and Catholics in all occupations, and then you might have Catholics that were members of the Veterans of Foreign Wars and those who were not?

A. Yes. I don't quite see the meaning of that question, but perhaps I will answer it as it appears to me and see if that is what you want.

To begin with, there is no question of picking, let's [584] say, persons in terms of their specific properties, that is, the method I envision is a method of picking randomly from a total group. Now it may involve controls in that it may involve picking the right proportion of persons from, say, Burbank or other areas—it doesn't matter what they might be—but the essential element to it, which guarantees in the long run the representativeness and the statistics which guarantees the fairness of the sample, is that all persons living or eligible, let's say eligible for jury service, or all members of the population, however you want to define it, shall have a chance to be included, or let's say, that the sample shall be picked at random and that statistically at random using random numbers or some other device shall be picked from the total group.

(Testimony of William S. Robinson.)

In other words, that there shall not be some pigeonholes with covers on the top into which you cannot reach to pick out cases. That is all. That will insure that there will be rich Catholics in the long run in the right proportion, and poor Catholics, many more of them because more Catholics are poor, in the right proportion, and every other possible combination of the millions of combinations of categories or properties in the right proportions.

Q. Let's assume that you have a community in which it is almost entirely composed of, let us say, Armenians. Now you would have to let that community be represented by one race exclusively, wouldn't you? [585]

A. You mean you have a sub-community, so to speak, a little area out here somewhere and there are only Armenians in it?

Q. That is right.

A. Well, I would have to let that area be represented by an Armenian.

Q. Yes?

A. Yes, provided that that area were large enough so that I would pick a case from it, or provided that the random method of picking areas happened to pick that area. It might be in a given sample that there would be no Armenians.

Q. Now you testified that the voters' register is a good source as a base from which to get the data upon which you base your computations.

A. I don't think I testified to that. I testified that it was better than any other published or known list.

(Testimony of William S. Robinson.)

Q. What are the faults with the voters' register?

A. The main fault with the voters' register is that—well, as far as jury service goes——

The Court: You might say that there are not enough Republicans on it.

The Witness: That is true. The danger—let me put it this way (and again it is a matter to be determined specifically whether it is at fault or not)—the danger is that [586] the voters' register—well that it falls into defect in one of two ways: that the number—of just kill that. Let me start over again.

If it doesn't include all persons who are eligible for jury service, let's say that it does not represent them proportionately as to their numbers, that is, that there be too many people of a certain kind in the voters' register, provided the voters' register does not represent all persons who are eligible; if the voters' register is in itself a sample, it might be a 90 per cent sample, of people who were eligible, but if it is a biased sample or partly biased, so that certain types of people are underrepresented in the voters' register, but those types of people are still eligible for service, as however defined by the law, then I would say that is a distinction into which the use of the voters' register might lead you, but it could lead you into no such errors, no such discrepancies, let's say, between distributions on the picked people and the total population as are involved in the exhibits here.

Q. It would lead to errors, is that right?

A. I don't know.

(Testimony of William S. Robinson.)

Q. You have never made a study of it?

A. Here is one case where it wouldn't: I don't know what the qualifications for a juror are, but if only registered voters, as I imagine is the case in some states, or in some places, can serve on juries then it is a perfect list.

The Court: I don't think there is any state where that requirement is a requirement.

Mr. Calverley: I don't think so either.

Mr. Margolis: The state of Texas, your Honor. Anyone who has paid the poll tax can vote.

The Court: Only those who have paid the poll tax?

Mr. Margolis: That is correct.

The Witness: But certainly the registry of voters comes closest to being an unselected published list of the people who I should think would be eligible for jury service, that is, people over 21, probably people who are gainfully employed, other gainfully employed people, and so forth. That is not a matter for me to determine unless you want to inform me as to what the qualifications are.

My main point is that it gets around much better than any other list such as the city directory.

Q. (By Mr. Calverley): I will advise you at this time in connection with my next question, to be a competent juror a person must be a citizen of the United States, of the age of 21 years, who shall have been a resident in the state and of the county and city for one year immediately before being selected and returned.

(Testimony of William S. Robinson.)

A. That is for a juror? [588]

Q. That is for a juror.

* * *

Mr. Calverley: I had just gotten to the end of the statement to the effect that a competent juror must be a citizen of the United States, of the age of 21 years, who has been a resident of the state and county and city and county for one year immediately before being selected and returned. Also he must be in possession of his natural faculties and of ordinary intelligence and not decrepit. And he must be possessed of sufficient knowledge of the English language.

* * *

Mr. Calverley: Well, the disqualifications are that a person shall not be convicted of any malfeasance in office, or of a felony. The next one is that he shall not have served as a juror or grand juror for a year and be now serving as a juror any place else. That is from the California [589] Code of Civil Procedure, Section 198 and Section 199.

* * *

Mr. Calverley: The requirements for registration, as I recall it in California, is that a person be 21 years of age and be a resident of the state one year and of the county three months and the precinct 30 days. That is my recollection.

Mr. Anderson: Forty days.

Mr. Calverley: Is it 40 days?

Mr. Anderson: And he must be a citizen.

(Testimony of William S. Robinson.)

Mr.) Calverley: Must be a citizen of the United States.

The Witness: If you want me to give you now a better answer to your previous question, I can do it.

Mr. Calverley: All right.

The Witness: I should say that the voters' register would be an excellent population from which to pick samples for jurors.

Mr. Calverley: All right.

Q. Now you testified that people in the lower income brackets have a tendency to move around more than people in the higher brackets? [590]

A. That is true.

Q. Now in view of the residence requirements, both as to registered voters and to be eligible to serve as jurors, wouldn't those classes be underrepresented in the voters' registry?

A. It is possible that they would be underrepresented to some extent. They certainly would not be as underrepresented as they apparently are in the group from which the present juries have been selected.

Q. But they wouldn't have their fair representation? A. I don't know that they would.

Q. As far as numbers are concerned from the statistical viewpoint?

A. I don't know. I testified not that low income groups tended to move about a lot, I said they tended to migrate from one section of the country to another. Once they get where they are going it

(Testimony of William S. Robinson.)

doesn't follow that they move any more than wealthy people. The people who migrated here, I should imagine, have by now pretty well established themselves and I imagine that they have established the qualifications for residence.

Q. Well, the people in the higher income brackets tend to own their own homes more, do they not, than people in the lower income brackets?

A. Yes. As I say, there would be some underrepresentation [591] of the very low income brackets, but how much I don't know. I only know that it would have been relatively small in comparison with the apparent underrepresentation in the 30,000 cards, or the 25,000 or 30,000 cards, whatever it is.

Q. And it is true, is it not, that people in the higher income brackets tend to—I will withdraw that question.

Would you say that people in the higher income brackets tend to have higher intelligence than those in the lower income brackets?

A. There is no evidence whatever as to that.

Q. Would you say that as a rule they tend to have greater knowledge of the English language than those in the lower income brackets?

A. Do you want me to guess? I don't know of any evidence but I will guess, or tell you what my opinion is if you like.

A. Yes.

A. I should think they would be more verbal and would have a better command of language, but I should think the difference would be relatively small.

(Testimony of William S. Robinson.)

Q. Is it true, is it not, that people in the higher income brackets generally have better educations than those in the lower income brackets, is that true?

A. That is true. There are complicating factors in the situation, namely, that older people who tend to have [592] higher income tend to have worse education than younger people because people didn't go to school as long in the days when they were educated, but I think it is true in general.

Q. Now without referring to the questionnaire system that has been mentioned here, mailing out questionnaires, your testimony was that people in the professional and semi-professional workers class and the clerical, sales and kindred workers class, tended to answer the questionnaires, or any questionnaire, more readily than persons in other classes?

A. Yes, a larger proportion of them return the questionnaires.

Q. Using the questionnaire system which has been employed in the Federal Court here in obtaining jurors, that would be defective in obtaining a cross-section of the community, would it not?

A. Not necessarily.

Q. People in the lower income brackets, you have testified, do not tend to answer their mail?

A. Yes, but a municipality or, let's say, a court has the power—let me give you an example. I served as a juror in the Supreme Court of New York, which is the Superior Court here, and the

(Testimony of William S. Robinson.)

court clerk told me that his return on questionnaires was much better than mine. He got 98.7 per cent of his back, because it was a misdemeanor if people didn't send them back. [593]

There is an answer to the questionnaire method. It is perfectly all right to use it providing you can slap people with a fine if they don't answer.

Q. Where you have just the voluntary system, just have a person send it in voluntarily or not at all, you are not going to be able to get certain classes, economic classes, fairly represented on the panels, is that right?

A. I don't want to appear to hedge, but to explain. In the group which you get in there will be an underrepresentation of the low economic classes. Now if you send out twice as many questionnaires as you are going to need you can throw out some of your high income people, that is, you can, after you get your group, if there is at least some one from each of the economic classes, you can adjust your group by throwing out members at random from different classes to make it match the population, which is another device which has not been mentioned here before but is perfectly feasible.

It is one which is often used. Collect a large group carelessly but sufficiently well so you have all types of people. Then start throwing out the excesses until you have a group which in certain respects matches the population.

Q. You mean that they would have to adopt a policy of throwing out certain classes of question-

(Testimony of William S. Robinson.)

naires as they come in, on the basis of individuals in a certain class?

A. Yes, but they wait until all of them are in and [594] then if there are too many businessmen they pick them at random to throw out so as to not throw them out with a bias.

Q. You have heard testimony that approximately two-thirds of the questionnaires sent out by the clerk were not returned, is that true?

A. And to volunteer, I would worry about adjusting a sample on that basis even there. That is too few.

Q. So far as you know, those which were not returned may have been in any of these economic classes, isn't that right.

A. Yes, but I have a pretty good idea as to what classes they were or that they represented.

Q. You testified that the telephone directory is not a good source because it represents too heavily the higher income groups?

A. That is right.

Q. Have you taken into consideration in that statement the inability to get telephones in this area recently?

A. Yes, and that would make the tendency still more pronounced.

Q. Why?

A. Because the main people who have come into the area are low income people and they are the people who would not have telephones, even if they could afford it.

(Testimony of William S. Robinson.)

Q. Well, in your work you are not concerned particularly [595] with exceptions, it that right, to the rule?

A. Oh, I am more concerned with exceptions than I am with the cases which conform to the rule, because it is the exceptions which really give you new knowledge. You can call it the analysis, if you like, of deviate cases. They will tell you what else is involved in the situation other than what you know already.

Again I must make a distinction. Here I have been talking about the majority, I have not been talking as a social scientist trying to get information. It is the odd case that tells you more than all the rest of the cases that behave according to Hoyle.

* * *

Q. What is your age, Dr. Robinson?

A. I am—if you will allow me to make a quick calculation—34.

Q. How long have you lived in this community?

A. I was born in this community and lived here until—I was born here in 1913 and lived here until 1936. That is 23 years. I returned to it merely this last summer.

Q. Have you testified in connection with these matters in any other court in this community?

A. In connection with these matters? I have not testified [596] in a court in this community ever, except now.

(Testimony of William S. Robinson.)

Q. You testified a while ago with reference to the average wage or median wage, I believe was the term you used, of various wage earners in the United States.

A. And the figures I gave were my recollection vaguely of figures back some number of years ago, 1936, '37 and '8.

Q. Have you made any investigation as to the wages of fishermen in this area?

A. No, I haven't.

Q. You don't know whether their wage would be over or under \$1500 a year?

A. I really haven't the slightest idea.

Q. If a person, instead of being employed as a fisherman but owns several boats and operates them as a fishing business, how would he be classified economically?

A. I think the census—if he operates them on shares—classifies them as fishermen. If he owns the boat but doesn't fish, or something of the sort, then he is a proprietor. But I am not certain. I would have to look the matter up.

Q. If a fisherman stated that he was self-employed in the fishing business, how would he be classified?

A. May I hedge again? Fishermen would have no opportunity particularly to say other than what the census enumerator asked them to say. Now there is a regular list of questions [597] which are asked by census enumerators. I have the census blanks for 1940 at my office and I can find from the

(Testimony of William S. Robinson.)

files what those questions were. I have the instructions as to the enumerators on the desk there. But I can't answer the question until I know what the census enumerator would ask the fisherman.

Q. Well, if an individual who was a prospective juror put "self-employed" on the questionnaire, how would he have been classified?

A. Either as unknown, or we first would have tried to get information further to satisfy ourselves. If we hadn't been able to get it we would have classified him as unknown.

Q. If he said, "self-employed, fishing business," how would you classify him?

A. He wouldn't have the opportunity because either we would use the city directory, which I think would be quite specific if he were in it, which I doubt, or probably we would have gotten to him ultimately by a telephone call or if we had the time in person and we would have found out what he did.

Q. Did you instruct the individuals who examined these questionnaires where an individual said he was self-employed in a particular business to classify him or to contact him?

A. It depends upon the individual business. Whenever there were questions the matter was brought to me, but a self-employed [598] grocer, it is obvious what he is, a proprietor.

Q. Well, if a man said "self-employed, fishing business"?

A. I don't think there were any there so the question didn't arise.

(Testimony of William S. Robinson.)

The Court: Suppose he had said that.

The Witness: I have already told you.

The Court: Tell us again, will you?

The Witness: I am sorry. I would have tried to get more information. Had I not gotten it I would have classified it as unknown, occupation unknown.

The Court: But he said he was in the fishing business.

The Witness: He gave his industry but he didn't tell me what his occupation was.

The Court: Self-employed.

The Witness: Self-employed is not an occupation.

The Court: It is not?

The Witness: It is an occupation term and so listed by the census bureau.

The Court: You wouldn't classify him as a manager, by any chance?

The Witness: I would classify him, I have already stated, as unknown.

Q. (By Mr. Calverley): You don't know of course whether the subordinates [599] carried out all your instructions in that regard?

A. One person—I am reasonably convinced that they carried them out.

Q. But you don't know that as an actual fact; you relied upon the information they gave you?

A. That is correct.

The Court: Suppose a man said he was self-employed in the fishing business, wouldn't you classify him as a proprietor?

(Testimony of William S. Robinson.)

The Witness: I would not. I would classify him as unknown, if that was all I had. For all intents he might be self-employed fishing off the end of a pier.

The Court: What were these people that were classified by you as proprietors—just take your questionnaire there—proprietors of what?

The Witness: Let's find some proprietors here. Let's see if I can find some.

The Court: I am referring now to Exhibit AA-2. You have Exhibit AA-1.

The Witness: I was looking for one.

The Court: Well, take AA-2. That is the one I have before me, so your AA-1 would be the list.

The Witness: An owner of a roofing business. That is a specific case. That is Victor LeRoy Burkhardt.

The Court: Can you find his questionnaire?

The Witness: I can if you want me to look for it.

The Court: Did you classify it from that information?

The Witness: Those are the words which appeared on the questionnaire. That is the source from which I got the information. I forgot to give you that the occupation designation came from the jury commissioner's record.

The Court: There are 86 of them here.

The Witness: We will go on.

Occupation, jury commissioner's record, manufacturer.

(Testimony of William S. Robinson.)

The Court: You would classify him as a proprietor, manager or official?

The Witness: That is right. And these are all proprietors, managers and officials.

Manufacturer of women's blouses. That is another one.

A manufacturer—another one.

A manufacturer of toys. It gives the name of the company—in fact, I can't read it here.

Vice president and sales manager.

Treasurer of the Thomas Manufacturing Company.

A manufacturer of children's wear.

Manufacturer of wool products.

A production manager of some corporation.

Owner of plastic manufacturing and club supplies.

Vice president in charge of personnel and labor relations of Gladding-McBean & Company. [601]

The Court: You have indicated all those in that exhibit, have you?

The Witness: Yes.

Retired food manufacturer. He is retired but the occupation designation is given.

The Court: You don't need to take the time now to go through all of them.

The Witness: All right.

The Court: You might hand that exhibit to me and I will be glancing at it.

Q. (By Mr. Calverley): You made no computations, Doctor, as to whether or not these were or were not represented on the jury? A. No.

(Testimony of William S. Robinson.)

Q. In these classifications of economic groups, I don't notice any distinction as to whether or not the individuals work by the day or the hour.

A. That is correct.

Q. There is no such classification, is that right?

A. That is right. There is no labor, as I think of the classification, of day laborers but otherwise the distinction is not drawn. That is, as far as that goes, there is a subclassification somewhere. It is not one of the major ones.

It is true, however, that among the various groups there [602] are possibly different proportions who work by the day.

Q. In other words, people who work by the day or the hour may be in any of these classifications?

A. I haven't looked at them in detail—well, I don't think a professional worker would work by the day or the hour, and I don't think——

The Court: Do any of those in that Class A?

The Witness: Well, maybe they do. Artists probably do.

The Court: Civil engineer? Actors?

The Witness: As I say, I haven't made a detailed study of it, but I will now do so if you want me to answer the question.

The Court: Dentists? They work by the piece, I guess.

The Witness: That is right.

Q. (By Mr. Calverley): If I understand your answer, Doctor, it is that people may work by the day or the hour in any of these general classifications.

(Testimony of William S. Robinson.)

A. Very likely in any of these classifications. Certainly a commercial artist could work by the hour in the professionals, and I suppose you could find that there are cases in all of them.

Q. And labor could include mental or physical labor?

A. That is true, except most kinds of mental labor occur in the professional group and not labor, if you are [603] thinking of laborers.

Q. I am referring to a person, a laborer, who works by the day or the hour. They may be found in any of those classifications, might they not?

A. I am sorry. I don't understand your question.

Q. I will reframe it.

Isn't it a fact that laborers employed by the day or hour might be found in any of these classifications?

The Court: You mean laborers? He has a separate classification for them. Do you mean any of these classifications might be paid by the day or hour?

Mr. Calverley: That is right, for work performed.

The Witness: That is true.

Q. (By Mr. Calverley): What systems of higher mathematics have you used in making your computations? A. Here?

Q. Yes.

A. The actual computations involve nothing more complicated than—wait a minute. As far as

(Testimony of William S. Robinson.)

computing values of Chi square, which is a figure I computed and in looking up the answer I used a table. It was simple arithmetic. I subtracted one in a number from another, squared the difference, divided it by something else, and added them all up.

As far as the derivation of Chi distribution goes, or [604] the proximity to the exact probabilities there, I did no mathematical derivations but I used some functions from analysis, so-called. I used some exponential functions. They are tabled. And I also used some logarithms. I am sorry I forgot those. But they are well-known table mathematical functions which you look up in a good-sized library.

Q. You have given some astronomical figures as to the probabilities?

A. That is correct.

Q. Now that means of course that at random that particular type or composition of a grand jury would occur only once in these large numbers of times, is that right?

A. That is correct, except it is even hard for a statistician to say it all in one mouthful. It is a probability of getting a sample as divergent as the one which occurred, or more divergent, a sample as bad as this one, as divergent from the population.

Q. How close do you think any system would be able to bring that down to some fair probability, let's say?

A. It depends again upon what you define as your population. But if you take the registration

(Testimony of William S. Robinson.)

of voters and randomly select as I have indicated your probabilities will all—well, once in 100 million times you will get a probability smaller than one in one hundred. The probabilities will all be large numbers, acceptable numbers. [605]

Q. They will all be large in a large community, is that right?

A. It doesn't matter what the size of the community is; there will be numbers that are credible numbers. That is, the probabilities will be, let's say, larger than—my difficulty is that the probabilities will have a distribution, that is, there will be certain numbers of different sized probabilities and I am somewhat—well, I am unable to describe this situation to you. But the probabilities will be numbers, let us say, most of them a decimal point and then some number other than zero. They will be relatively few in which there are one or two or three zeros before you come to a digit other than zero. In fact—well, all right. That is about the best I can do.

Q. Almost under any system the probabilities wouldn't run over 1 in 10 to 100,000, under any system, would it?

A. Only one time in a hundred thousand would you get something occurring with a probability of one in a hundred thousand. That is how probabilities are defined. For example, I can give you an example of a sample which would have a probability, let us say, of .1, one tenth. Well, that is the kind of sample or the amount of discrepancy which

(Testimony of William S. Robinson.)

would arise in a random sampling one time out of ten, so you would expect that to occur one time out of ten.

If you went on doing this year after year ultimately if [606] you did it a thousand times you would tend to get once or twice a sample which, if diverged to the extent of having a probability of .001, or 1 in 1000. But you wouldn't get a run of them at least.

Q. From your computations can you state whether or not all of the other groups that I have mentioned, which include racial, social, geographical, religion, excluding the economic, would be adequately represented in this panel?

A. Any groups, however defined, would be, and that follows merely from the deductible definition of randomness. If you pick from a total group randomly so that the members of the group are accessible, all of them—in other words, you have the population—if you then select members from it at random any property you could imagine of those individuals, including whether or not they have diseased tonsils, will be fairly represented in the sample group.

The Court: Does that affect the person's economic viewpoint, if they have diseased tonsils?

The Witness: I don't know. It might be possible at that. Diseased tonsils can tend to make you depressed, and that might make a person a Republican.

(Testimony of William S. Robinson.)

Q. (By Mr. Calverley): You have heard the testimony that all of these racial groups that I mentioned, these hyphenated American racial groups, and these social groups that I mentioned, and [607] the religious groups, were not identical in obtaining these lists? A. That is correct.

Q. Well, then, how do you explain that the names that were drawn out of those groups would necessarily be disproportionate in so far as religious and racial and social groups are concerned?

A. Because religion, race and social position are correlated with occupation and particularly with income levels, and if something is disproportionate with regard to occupation it will be disproportionate with regard to anything that occupation makes a difference to or that is correlated to occupation.

Q. Wouldn't the geographical factor tend to throw that computation off as being inaccurate. You would have to balance it with the geographical sections of the area. A. Balance what?

Q. Well, you would have to get a fair cross-section of the community. You couldn't disregard the geographical consideration, could you?

A. That is what I said when you asked about geographic regions. I said if I was controlling this procedure—you were asking me then in general, not sampling from the voters' register—in sampling from the voters' register I would take a purely random sample, but if you ask me to go out with [608] a field crew to select a random sample from the

(Testimony of William S. Robinson.)

population, I would first control it geographically, that is, I would get the right number of people from the various geographic regions or I would select at random and perhaps with other controls as well within those regions.

Does that answer your question?

The Court: On your previous answer, I don't know that I quite understood you. I understood you to say that by virtue, for instance, of the September 1946 petit jury being overweighted with proprietors, managers and officials, so far as what you have described as economic classes, it would likewise be overweighted as to race and religion. Did I understand you correctly?

The Witness: If that is a correlation, and I say there is a correlation in general, between income level and religion. If you want to know what the occupations are I can list them for you.

The Court: Then I am to understand that by virtue of their having been 86 of the group on there you do not have a proper representation of the races or of religion?

The Witness: I think that is correct. For example, the higher income occupations are overrepresented there.

The Court: In what race are they overrepresented?

The Witness: Let's take religion first, since race is another matter. They are underrepresented in Catholics. [609]

The Court: Proprietors and managers and officials?

(Testimony of William S. Robinson.)

The Witness: Not the whole group, just that jury.

The Court: I am speaking of this one classification. Now you say by virtue of that being overweighted, it is underweighted in Catholics, that is to say, that there are less Catholics among that group than others?

The Witness: There are less Catholics among that group than there are—again if you want me to make a statement I will have to make it statistically. No single group is underweighted or overweighted. The point is, the whole distribution of occupations is overweighted in certain groups and underweighted in certain others.

The Court: As to occupations?

The Witness: That is correct. Now there are more persons in this whole group from high income levels than I should imagine are quite fair as regards the total population. That would mean, and it may not mean on this group but in the long run if you kept doing that you would find that those groups overweighted on the high economic levels would be underweighted in Catholics. They would have too few Catholics if they have too many high income people.

Likewise, if they have a large number, a disproportionately large number, of high income people they will have disproportionately a low number of Mexicans.

The Court: How about the national derivation, would you [610] say that this is likewise overweighted as to national derivation?

(Testimony of William S. Robinson.)

The Witness: I used the term Mexican already.

The Court: Only as to Mexicans then?

The Witness: No, but that is an example. If you want to find out what the express correlations are, or the Irish, German and the rest, I can find them, but I know in general what those patterns are, and that Negroes, Mexicans, the foreign-born in particular, tend to fall primarily in the low income groups, and that the native-born whites are overweighted in the high income groups. So if you pick a high income group, or a high economic group, you get too few foreign-born, too few Mexicans and too few Negroes. You know that as a fact, your Honor. Everybody knows it.

The Court: I thought I knew something before this proceeding started, but I am not quite sure now.

The Witness: Will you find any Negroes in the top 5 per cent of the incomes in Los Angeles County?

The Court: You answer the question as long as you are asking it.

The Witness: You find too small a proportion naturally.

The Court: Now on the 86 here and the 44 and the different classes——

The Witness: You are referring to W-2 now?

The Court: Yes. [611]

The Witness: I have my WW-2.

The Court: Take AA-2.

The Witness: AA-2; all right.

(Testimony of William S. Robinson.)

The Court: On the social scale, is that what you call it?

The Witness: This is a scale of social economic status.

The Court: This is the social economic status. Well, the lodges and clubs counsel referred to in his question, would you say by virtue of this being overweighted that it is overweighted as to them, and if so which ones?

The Witness: I really wouldn't say that it was necessarily overweighted there for the reason that the club membership is so small that I don't want to make a statement about that.

The Court: You don't know?

The Witness: I will tell you this, if you were to take a sample of 188 cases, as this one is of 188 cases, you would get in it proportionately more club members than there are in the population.

The Court: Very well.

Q. (By Mr. Calverley): What is your computation as to the various religious groups?

A. I have made no computations in respect to religious groups. [612]

Q. Your conclusion then that certain religious groups are found in certain economic classes, that would vary with the community, isn't that right?

A. Yes. The proportion certainly vary. In general it is true that Catholics are—perhaps I am giving you a false impression but these correlations are not.

The Court: That is quite possible.

(Testimony of William S. Robinson.)

The Witness: I am very much aware of the fact. These correlations are not very high. For example—well, the only one I can remember is that their figures indicate that there is a correlation between color and illiteracy. That is, Negroes tend to be illiterate much more than whites. If you want figures on that, I can give it to you. It is one out of ten whites that is illiterate and one out of four or five Negroes is illiterate. So if you pick whites you are picking people for whom there is a greater proportion of literacy. But the differences are not very marked.

Q. Well, the fact that a great many Negroes are illiterate and that they are in the economic bracket, that would tend to reduce the proportion of laborers in Class K who would be eligible for jury service?

A. Negroes are illiterate, incidentally, primarily in the South, not here.

The Court: Then your previous statement does not balance, as to the one you just made previously based upon the [613] proposition that the Negroes are illiterate?

The Witness: It is true for the United States as a whole, but the percentage of Negroes who are illiterate will vary widely between states, as religious groups vary widely between states and areas.

The Court: Have you taken any statistics here on the matter of illiteracy?

The Witness: Would you care to see the figures? They are on the desk. I happen to have finished writing an article for the Journal of American Civics Association.

(Testimony of William S. Robinson.)

The Court: You have taken those figures?

The Witness: I have taken those figures.

The Court: What are the figures here for illiteracy?

The Witness: I haven't the slightest idea, but I have them there if you want to know.

Mr. Margolis: Is this the article you were talking about?

The Witness: Yes. I think that that article has embodied in it only the divisions in the United States, of which there are nine or ten, but I have them for California.

This article is called "Ecological Correlations on Behaviour of Individuals." It is completely irrelevant to the Negroes. They are used just as an example.

The Court: They are irrelevant to your article?

The Witness: Yes. I will find you the page on which it [614] gives the number of literate and illiterate Negroes and whites.

The Court: In Los Angeles County?

The Witness: No, I have no figures for Los Angeles County.

The Court: You have none?

The Witness: No.

The Court: Do you have them for the state of California?

The Witness: In my brief case I have them. Here I have them only for the Pacific division.

The Court: The Pacific division?

The Witness: Yes.

The Court: Are they based on the 1940 census?

(Testimony of William S. Robinson.)

The Witness: No, they are based on the 1930 census, for a reason that is given in the article.

The Court: The 1930 census?

The Witness: Yes.

The Court: That wouldn't be very valid now, since there has been a large increase in population here.

The Witness: The proportions. They are based on the 1930 census for a reason given in the article, but if you care to read the figures, they are here.

The Court: Not for the 1930 census.

Q. (By Mr. Calverley): The illiteracy of a large segment of any given community [615] would tend to make that group's representation on any jury panel disproportionate, isn't that right?

A. Not necessarily.

Q. As to the numbers of people in that class, that low economic class, because they wouldn't be able to answer any questionnaires?

A. But I am not——

Q. You couldn't get results from a source where the individuals are not only ineligible as jurors but couldn't comply with the questionnaire requirements?

A. The largest proportion of illiteracy that I know of in any state is about 1 in 5, which means that 4/5 of that group are illiterate, and all you need to do, if you are picking people, is to pick a few more of them and then throw out those who are illiterate, send a few more questionnaires to Negroes and to Negro areas. [617]

(Testimony of William S. Robinson.)

On the population estimates that were given to me this morning by the Regional Planning Commission, they estimated 3,747,962. Assuming that that is an approximately valid estimate, and taking into consideration that the December 27th registration, that is, the present registration of Los Angeles County, is 1,277,418—let's take the next assumption that 27½ per cent of them are under 21 years of age—I have made that calculation, that would be 1,040,689, which would leave 2,707,273 over 21 years of age.

Then we will take the registrations, 1,277,418. That would indicate that there were 1,529,000 or roughly 1,530,000 persons over 21 years of age in Los Angeles County whose names do not appear upon the registry of voters lists, which is a greater number than those that are registered.

Now in view of that would you say that a fair cross-section of the community could be obtained by the random method of selection that you have suggested confined only to the voters' registry?

Mr. Margolis: Just a moment, your Honor. I want to object to that question because instead of using the large registration figure which is available, which is only a few months old, isn't there a larger registration figure of 1,800,000?

The Court: They are not registered now. If you are going to use this you have to use the present list. [618]

Mr. Margolis: There is no testimony to that effect. Any reasonably recent list, the largest reas-

(Testimony of William S. Robinson.)

onably recent list that you could get would certainly be better, let's say a list that is three or four months old and it was larger than a list of today would certainly be better.

The Court: Counsel, I do not think your objection is valid at all. The 580,000 people are dropped because they didn't vote.

Mr. Margolis: That is right.

The Court: And I think everybody that has lived in this community any length of time knows that there is a great segment of the people who lose the right to vote because they move from place to place.

In any event, this is the current registered voters list, and I would like an answer to my question.

Mr. Margolis: I want the record to show my objection. I object to the question on the ground that it makes an unfair and an unreasonable assumption.

The Witness: The answer is that that is a matter to be empirically determined after studying the addition of probabilities in the voters' register or a random sample from them with a distribution of the population. I don't know.

The Court: Well, if that is the case then how are you qualified to express an opinion on the present voters' register? [619]

The Witness: I know it is better than the present method of selecting jurors, that is all. And I have given my reasons for knowing that it is better.

The Court: I know, but in connection with this, your testimony here, I have taken advantage of your knowledge and experience in an endeavor to find

(Testimony of William S. Robinson.)

some way which might be a better method of selecting a cross-section, and you have said the voters' register——

The Witness: Is a better method.

The Court: ——is a better method than the one we have?

The Witness: That is right.

The Court: But there is still more than half the people that would not be represented on the voters' register.

Mr. Margolis: I object to that assumption, your Honor, assuming a fact contrary to the actual facts as to what is available.

The Court: I am sorry, counsel. Will you explain that?

Mr. Margolis: Yes. This assumes that the only registry of voters that is available is the one having 1,200,000 voters, roughly that, whereas there is a recent registry available having—I don't have the exact figures—but having many more than that.

The Court: It was the December figure.

Mr. Margolis: The December 1946 figure.

The Court: December 27, 1946. [620]

Mr. Margolis: And your Honor has the exact figure there. I don't have it.

The Court: It is 1,861,000.

Mr. Margolis: I object on the ground that the December 1946 figure of 1,800,000 as between December 1946 and February 1947, that certainly that December list would be a far more representative list than the one that is available. I think that any

(Testimony of William S. Robinson.)

assumption that some 500,000 or 600,000 people have moved is just an assumption that has no relationship to what we know about what people do here.

The Court: In connection with your latter statement, counsel, I do not wish to be put in the position of testifying, but your statement that it is contrary to what people know, you may be interested in knowing that I spent considerable time studying voting statistics, and the movement of people in Los Angeles, and when I spent my time I discovered that in two years 40 per cent of the people moved.

Mr. Margolis: I think that was at a time when the present housing shortage did not exist.

The Court: I think that is true too, but in any event your objection is overruled on the ground that this is not a fair question. I am only asking for his opinion and asking him to take these assumptions.

I still don't know what the answer is.

The Witness: Well, let me put it this way: It is my [621] opinion that to use 1,300,000 roughly would be infinitely better than to use 30,000. Is that what you mean?

The Court: No, that isn't what I mean.

The Witness: You would get in more kinds of people.

The Court: That isn't what I mean at all. How can you have a fair cross-section of a community when you have represented on that list less than one-half of the population over 21 years of age? That is the long and short of it.

(Testimony of William S. Robinson.)

The Witness: You may have a group of 10,000 which is a fair representation of the whole community, I don't know. It is a matter to be determined how fairly they represent the community.

The Court: I think you understand pretty well what I am driving at. You have based a lot of testimony here upon the proposition that the voters' register was the best method which would be available here?

The Witness: That is right.

The Court: Now any method which would purposely exclude 1,529,000, or more than half the population, or assuming that there were 583,000; taking the previous December figures, would you say that you could obtain from that a fair representation of the population of the county?

The Witness: Would it not be excluding those very people who are ineligible because of moving, or at least a good portion of them? [622]

The Court: No, that does not constitute a ground of ineligibility.

The Witness: I understood that some kind of residence qualification was necessary.

The Court: They have to live in the state more than a year before they can vote, as I remember.

The Witness: Residence of one year, I have it in my notes, for jury service.

The Court: That is right.

The Witness: All right. Well, I can only answer you that it is an infinitely better cross-section, and it must be, than one based on 30,000 cases.

(Testimony of William S. Robinson.)

The Court: Your only answer is that it is better than the one we have?

The Witness: And it is the best of any that can be based on a public or known list, and that is required before you can take a fair sample, unless you want to spend a lot of time and a lot of money getting the members of your sample.

The Court: Would this be representative of the whole population of the county so that a fair cross-section could be obtained? That is what I am trying to get your opinion on.

The Witness: I don't know.

The Court: You don't know?

The Witness: Because I haven't found out. I haven't studied it. It would certainly be more representative than [623] the samples you now have.

The Court: I think you have told us that a number of times. What things would you want to find out?

The Witness: I would want to take a sample from the voters' register and send out some interviewers.

The Court: From the voters' register?

The Witness: Yes.

The Court: You wouldn't want a sample from the people who are not on the voters' register?

The Witness: For the people who are not on the voters' register, unless you want to spend a great deal of money you have to rely upon the census.

The Court: The census doesn't furnish any names and addresses.

(Testimony of William S. Robinson.)

The Witness: No, but it tells you what the distribution is on certain important characteristics; the question is of getting the same distribution by occupation, by race and by other things. Now I may take a sample from the voters' register and find the race and occupation and other things for those, I would say, 1000 people and compare the distributions or the percentage in various class of those people with the percentages as given for the total population by the census, and then I could answer your question. [624]

* * *

The Court: Now in connection with your studies made and represented here by Exhibits W-2 to II, did you make the same kind of study for the jurors or any portion of them which were currently selected by the County, according to Mr. Janney's testimony? [625]

The Witness: No.

The Court: You did not?

The Witness: No.

The Court: When you instructed your assistants to inquire into the occupation of the various persons whose occupations are not reflected in the questionnaire, did you instruct them to inquire into their past occupations or ask them how long they had been in the particular business they were engaged in?

The Witness: No. The census does not either.

The Court: I am not worried about the census, I am only asking about what you did.

(Testimony of William S. Robinson.)

Q. Did you make any inquiry at all concerning any of the persons whose occupations you classified here concerning what their occupations were, if they had ever had any at any time?

The Witness: No.

The Court: Now will you take Exhibit W-2—I think you have the original there——

The Witness: I might add that in the case of the retired, if you consider being retired an occupation, I did.

The Court: You asked what they previously had done?

The Witness: Yes.

The Court: That was a very small percentage of the people though? [626]

The Witness: That is right.

The Court: Take Exhibit W-2. You have expressed your opinion, in response to quite a number of questions by Mr. Margolis and by myself, but I do not think that you have stated on complete answer in which you would state your postulates and premises and your reasons for your conclusions. Will you take the W-2 Exhibit. What are your premises? What did you start with? What did you take into consideration?

The Witness: I assume first that the occupations will be correctly classified.

The Court: You made some assumptions concerning population first, didn't you?

The Witness: The particular form of reasoning I assumed——

(Testimony of William S. Robinson.)

The Court: You started out by assuming that the population of the county as of the 1940 census was so much, is that correct?

The Witness: That is correct.

The Court: Then you started and next assumed that the census classification of occupations was a representative cross-section of that population?

The Witness: Yes. I took the census figures for the percentages in the various occupations.

The Court: But in doing that you assumed that these headings were a representative cross-section of the occupations? [627]

The Witness: Yes. In other words, that they, let's say, exhausted the occupations.

The Court: And that they were fairly representative of the cross-section of the occupations, or that these were a cross-section of the occupations?

The Witness: I see what you mean.

The Court: You assumed that?

The Witness: Yes.

The Court: Now go on from there as to what your assumptions were.

The Witness: Then I assumed as a hypothesis to be tested, let's say, that these 23 cases had been drawn at random from a representative cross-section of that population already assumed.

The Court: The 23 cases?

The Witness: Yes. I am dealing with the right-hand column now. Then I computed the probability of getting that drawing of 23 cases on that assumption that they were a random selection from a rep-

(Testimony of William S. Robinson.)

representative cross-section of that population. That is all. The probability turned out to be very slight.

The Court: One of the factors which was a constant factor, if that is the correct term, was that the population was the 1940 population? [628]

The Witness: That is correct. Then noticing that the probability was so very slight I looked for elements, let's say, in my chain of assumptions which would make the probability very small and the one to be tagged, so to speak as the one, since these items were randomly selected, these 23 persons were randomly selected from the cards, the only alternate explanation for the great discrepancy is that the list from which they were selected randomly is not representative.

The Court: I understand. Let us go back to your assumptions again. In making your mathematical calculation that constant factor was the 1940——

The Witness: Occupational distribution.

The Court: Was the occupational distribution?

The Witness: Yes.

The Court: In other words, you had to assume that there was the same number of actors that they gave there?

The Witness: The same proportion; same percentage.

The Court: The same percentage?

The Witness: Yes.

The Court: Then you didn't use the 1940 census as a constant factor, did you?

(Testimony of William S. Robinson.)

The Witness: Yes. I assumed that the percentage of professional workers remained the same up until 1946, in other words, and the percentage of the business proprietors, managers and officials in the population remained the same. [629]

The Court: Then you did not use the population of 1940 as a constant factor, that is, the total number of people in the country?

The Witness: No.

The Court: It was only the percentages?

The Witness: There is no reason for using the total population.

The Court: I am not asking for the reason, I am asking whether you did or didn't.

The Witness: No, I did not. To be quite specific, I did because I divided the population in a given group by the total population of the county to get the percentage. [630]

* * *

EDMUND L. SMITH

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

The Court: The first question I have is in connection with the city directory. You said the other day that you had a 1942 city directory. Why don't you have a subsequent city directory?

(Testimony of Edmund L. Smith.)

The Witness: The city directory I have is labeled 1941-1942, and some time ago inquiry made from the company that publishes it, and with whom we have a standing order for a copy, they stated they didn't know when they would publish a new one.

The Court: That is the last one that was published?

The Witness: That was the last one published that I am informed had been published.

The Court: The Administrative Office of the United States Courts does, however, furnish you with a copy of the directory?

The Witness: Yes. I believe it costs \$25.

The Court: Now did you make some inquiry from the registrar of voters' office concerning the cost of the voters' lists?

The Witness: I did. I called Mr. Donahue personally [639] and inquired of him from whom and how much the list of the roll of voters from Los Angeles County would cost, and he said it could be obtained from the County for \$930.58.

The Court: Did he indicate whether or not the roll presently available has on it names which will be excluded from voting after December 27?

The Witness: Yes.

The Court: They do have them on it?

The Witness: The last list published as of November of last year has a list of names of 1,861,145 names, which he stated was approximately 70 per cent of the registration.

(Testimony of Edmund L. Smith.)

The Court: 70 per cent of the qualified voters?

The Witness: I assume that is what he means.

The Court: That is the list before dropping of some 500,000 which were dropped in December?

The Witness: Yes. That list includes over half a million which have been since dropped. There will not be a new printing of the list until May 1948.

The Court: And since then there have been additional registrations, I suppose?

The Witness: There have been over 100,000 in the city of Los Angeles new registrations not on the list.

The Court: All right.

Now I asked you to bring into the courtroom one of your boxes of cards. Do you have that in front of you? [640]

The Witness: I do.

The Court: Now that is not the available box?

The Witness: No.

The Court: The available box is made up of how many boxes just like that?

The Witness: There are about nine or ten similar boxes at the present time.

The Court: I understand from your testimony, and I am not sure whether the record is or isn't clear, but in any event with this box in front of us we can clear it up. The names on the list submitted by the jury commissioner do not get into the available box until after they have been summoned to serve on a jury, and that when he submits a list of names you select cards at random from your available box and put them with his list of names, sending out

(Testimony of Edmund L. Smith.)

questionnaires, and from there on with the processing which you have described. Now is this the box containing names of his which have not served or been summoned on juries as well as the cards taken by you from the available box? Let's cut it short: What is that box?

The Witness: This is a working box that I obtained a few months ago prior to receiving index cards which I had ordered some six months before that.

The Court: I don't mean what is the physical box, but what is in the box. Where do the cards come from? [641]

The Witness: These cards in this box are cards that I selected at random; a partial selection—I hadn't completed it yet—of cards from the available box.

The Court: All of them?

The Witness: No. There were a few cards which had been made up from the jury commissioner's list prior, and erroneously I might say, to the sending out of questionnaires. So those cards were placed—I gave it to one of the clerks and had those placed—with the others in alphabetical order for the purposes of mailing questionnaires to these prospective jurors.

The Court: So that that box is the current box upon which you are now mailing questionnaires, or will mail questionnaires in your next questionnaire mailing?

(Testimony of Edmund L. Smith.)

The Witness: That is correct. I started this several months ago in a contemplation of mailing questionnaires because there were only 17 names left in the box—no, at the time of the emptying of the box, and these are the cards to whom questionnaires had not yet been mailed and were therefore not ready for the box at the time.

The Court: For the master box?

The Witness: Yes, at the time the commissioner and the clerk placed the names in the box on January 2nd of this year.

The Court: Now before those names get into the master box they go through your process of either being weeded out [642] by questionnaires, summoned, excuses, or they go into the master box and from there the jury is selected, and after that they go back into your hold box for two years and then into the available box, is that right?

The Witness: That hold box is part of the available too, but considering the whole thing as available.

The Court: But you hold it for two years?

The Witness: Except those that were excused permanently or deceased and those cards are temporarily placed in a leave-out box for discards and other uses.

The Court: Can you tell from that box, of the cards there how many of those people originated with the jury commissioner and how many originated from you?

The Witness: Deputy Clerk Horn had counted the cards and I believe it is closely approximately correct.

(Testimony of Edmund L. Smith.)

The Court: What is the total number of cards?

The Witness: The total number of cards here at present is 1239.

The Court: Now he classified them by——

The Witness: Prospective jurors never called and never served, 266. That I would say are the cards referred to, almost all of them are the cards made up from the jury commissioner's list and which were not used prior.

The Court: Now what are the other classifications you have in that box? [643]

The Witness: The others I would say came out of——

The Court: What are the classifications?

The Witness: Jurors called and excused and not served, 215.

Jurors called and served once, 208.

Jurors called and served more than once, 288.

Jurors called more than once and served only once, 262.

The Court: What was the first classification, those prospective jurors never called?

The Witness: Never called and never served.

The Court: How many?

The Witness: 266.

* * *

Cross-Examination

By Mr. Margolis:

Q. When you made your inquiry of the registrar of voters, Mr. Smith, did you find out whether you

(Testimony of Edmund L. Smith.)

had to buy all of the precinct lists or whether you could buy selected ones or whether it would make any difference in costs?

A. My inquiry was, on account of the orders of the court, that it would require the whole county list.

Q. You didn't make any inquiry about buying selected lists? [644] A. No, I didn't.

Q. On this question of new registration of 100,000 people, as I understand it, that new registration would include any of the 500,000 or 600,000 who permitted their registration to lapse and who have re-registered?

A. That is correct. And Mr. Donahue states that he estimated that there would be out of that half a million stricken from the rolls for non-voting approximately 121½ per cent or better re-registered either at former addresses or at new addresses.

* * *

Cross-Examination

By Mr. Calverley:

Q. Mr. Smith, did you observe whether or not the names which you find in your available box are residence or office addresses?

A. They are almost in all instances residence addresses.

Q. When you obtained lists yourself did you look for residence addresses or office addresses?

A. Always residence addresses.

(Testimony of Edmund L. Smith.)

Q. You gave me a list the other day entitled "Residence [645] Zone Sections of Jurors Impaneled February 10, 1947." What does that indicate or what is it?

A. This is a compilation of the jurors impaneled for this term as to mailing zone numbers in the city of Los Angeles and the names of outside cities or towns near the county.

Q. Does this list indicate the number of jurors impaneled from these various zones and from the various outside cities? A. No, it does not.

The Court: The number in the master box?

The Witness: No, this is merely an indication of the territory or geographical distribution of the residences of the jurors.

The Court: Is that the jurors in the master box or the ones who have been pulled out of the box?

The Witness: Of the ones who have, as it states here and as the district attorney stated, the jurors impaneled for the February term.

The Court: The jurors impaneled?

The Witness: Yes.

The Court: You have made no such compilation for those put in the master box?

The Witness: Not of the total; no.

The Court: Of the 800 and some-odd that you testified to the other day? [646]

The Witness: No. These are only those we got after the impanelment.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Calverley): Then the column on the left under the heading "Los Angeles Zone Numbers," would indicate that jurors were drawn from all of these zone numbers underneath there?

A. That is correct.

Q. And this total figure down here wouldn't mean anything?

A. That wouldn't mean anything.

Q. Then the column on the right, "Outside Cities," that column indicates that jurors were drawn from all of those cities?

A. That is right.

Q. On the panel for the February 1947 term?

A. That is correct.

Mr. Calverley: We offer this in evidence, your Honor.

* * *

Mr. Calverley: The total at the bottom may be taken off as it has no significance.

The Court: No. 6. [647]

* * *

Cross-Examination

By Mr. Margolis:

Q. Is this a list of the outside cities in Los Angeles zone numbers for the grand jurors or for the trial jurors of the February 1947 term?

A. I understood this was the petit jury, but I would have to verify that. One of my deputies made that up. Whether he included the 23 jurors—I don't believe he did.

(Testimony of Edmund L. Smith.)

Q. How many persons does this cover?

A. That covers between, as I stated, those who were impaneled on the 3rd of February, between 100 and 150. Now some of those jurors are available now, a few have been excused by the judge to report a little later, but they have been impaneled and they are included.

Q. Can you get the exact figure, the number of persons who are covered by this? Would that be available?

A. Yes.

Q. I would like to have that. Do you know, for example, how many persons in this group came from Beverly Hills?

A. No, I wouldn't.

Q. You would have no way of knowing that?

A. No.

The Court: Isn't it indicated on there, their mailing address?

Mr. Calverley: No, your Honor. All that it indicates [648] is the sources from which the panel was drawn, the location of the persons. It is just for geographical purposes only, and as to the numbers it doesn't indicate the numbers but it says that some of them were drawn from all of the localities.

The Court: I see.

Q. (By Mr. Margolis): From all that appears from this exhibit, for example, 50 people might have come from Beverly Hills and 1 person might have come from zone 34?

A. That is right. It doesn't indicate how many came from each geographical location.

(Testimony of Edmund L. Smith.)

Q. This is intended to show just that there was one or more people out of a number which are going to get on the jury from each of these geographical locations and it doesn't purport to consider the extent to which or the size of the groups from each of these geographical districts?

A. No, but that can be ascertained.

Mr. Margolis: For what it purports to show, or for what it is worth, I have no objection.

The Court: Exhibit No. 6.

(The document referred to was received in evidence and marked Government's Exhibit No. 6.) [649]

* * *

The Court: Before you do, do you have a report here from the administrative office, Mr. Smith, in 1941?

Mr. Calverley: This may be the document that the Court refers to.

The Witness: This is the report that antedated the report of the Judicial Conference Committee in evidence under the green cover of September 1942.

The Court: What is the date of that?

The Witness: This letter from the Director of the Administrative Office is dated February 5, 1941.

The Court: Was that brought to your attention?

The Witness: Yes.

The Court: On or about that time?

The Witness: Yes, in connection with this report of 1942 which I have had for a long time.

(Testimony of Edmund L. Smith.)

The Court: Very well. Does the government want to offer this in evidence, or does anybody want to examine it?

Mr. Calverley: We will offer it, your Honor. We have no objection.

* * *

The Clerk: No. 7. [650]

(The document referred to was received in evidence and marked Government's Exhibit No. 7.)

* * *

Cross-Examination

By Mr. Garrett:

Q. The figures you gave, Mr. Smith, they were read rapidly. I didn't get all of them. I got only the figure of 266 for prospective jurors never called and never served.

A. That is correct.

Q. Is that the first of your figures?

A. That is the first column.

Q. And to what list of jurors does that figure relate?

A. It related to those cards which I stated I commingled with the cards that I took from the available box, available drawers.

Q. Those were cards direct from the jury commissioner's lists without benefit of questionnaires, is that right? A. That is right.

Q. When was that done?

(Testimony of Edmund L. Smith.)

A. I can ascertain the approximate date—I meant to have that here—by looking up the date I received index cards. It would be prior to that date. I had to make up an improvised index because I had no index cards. I would say within the last, oh, it was subsequent to September and prior to December. It must have been along in November or early part of December.

Q. 1946?

A. That is right. I worked on it in the evenings and on Saturday afternoons and at odd times.

Q. Now can you give me the second figure, the one following the 266 cards?

A. That list is of jurors called and excused or not served, 215.

Q. What was your next number?

A. Jurors called and served once, 208.

Q. What was your next number?

A. Jurors called and served more than once, 288.

Q. That is the last one, isn't it?

A. No, there is one more.

Q. What is the last one?

A. Jurors called more than once and served only once, 262.

The Court: Or a total of 1239 names in the box.

Q. (By Mr. Barrett): There is 1239 total?

A. Yes.

Q. Did you ask Mr. Donahue whether he would give you a set of those lists? [652]

The Court: You mean free?

Mr. Garrett: Free; for free.

(Testimony of Edmund L. Smith.)

The Witness: No, I didn't because——

Mr. Garrett: Just a moment, please.

Q. The answer is no?

A. That is correct.

Q. Isn't it a fact that the County Clerk, the Clerk of the Superior Court of Los Angeles County, receives a list of those, or a set of those free each time they are published?

A. That I have no knowledge of.

Q. Did you make any inquiry along those lines?

A. No.

The Court: Doesn't the state law require them to be furnished?

Mr. Garrett: I don't believe so.

The Court: I was under that impression.

Mr. Garrett: The point I am making is that Mr. Donahue would probably make a charge if these lists were furnished to a private agency, such as a person who prepares mailing lists, but the situation seems to be that as to public court officials requiring them the lists are given without charge by the County Registrar.

The Court: That is the state officials, I think you mean. I took it from Mr. Janney's testimony the other day when he broke down the costs, and Judge Kenny's questions, [653] that the idea was that the relationship was such that the County could get that list that they had, or even an old one, but it would require the payment of an approximate cost of securing each name, which as he testified

(Testimony of Edmund L. Smith.)

was \$2.30 roughly per name. So I suppose the same relation exists with the county. Maybe you can get them free.

Mr. Kenny: At the appropriate time I want to give my views on any impression that I might have given in that testimony.

Mr. Garrett: Just one more question:

Q. Is it not a fact that the list of registered voters is furnished by Mr. Donahue each time they are published, that is, once about every two years, free of charge to the Clerk of the Municipal Court for the City of Los Angeles?

A. That I have no knowledge of.

Q. Did you make any inquiry as to whether or not any charge was made for the furnishing of the lists used by the Superior and Municipal courts here?

A. I did not.

Q. Did you make any inquiry as to whether or not your office could obtain the list free?

A. I told him who I was, what it was for, and assumed, perhaps.

Q. Just what was it you told him? Will you give us the conversation just as you recall it, Mr. Smith, as to what [654] each of you said?

A. I said, "At the instance of one of our judges, Judge Hall"—I gave him my name and said first that "I am the Clerk of the United States District Court here and I would like to inquire from whom and how much a list of the registered voters for the County of Los Angeles would cost."

(Testimony of Edmund L. Smith.)

He stated that they were obtainable from the County and not a private printer, as I had believed, and that the list is only as of November of last year, and gave the number, 1,861,145, which he said was approximately 70 per cent of the registration and that upon my inquiry that it also included the half a million or more names stricken for not voting, and that a new list would not be printed until May of 1948; that the present list available does not include over 100,000 new registrations in the city of Los Angeles since the striking of the names, but he said that the half a million or more stricken, that of that number a great many would re-register from the same addresses or from other addresses to the extent of approximately 12½ per cent or better.

The Court: Where did you get this \$580? You haven't said anything about that yet.

The Witness: I thought I stated that in the beginning, that it would cost \$930.58. [655]

* * *

Cross-Examination

By Mr. Kenny:

Q. Mr. Smith, did you ascertain from the Board of Supervisors or any member thereof whether or not it is not a fact that it is their practice to give away copies of lists of registered voters for gratis to many worthy causes, shall we say?

Mr. Calverley: I am going to object to that as immaterial. I don't think there is any duty to go around and beg for these in order to have efficient

(Testimony of Edmund L. Smith.)

administration of the jury selection system here. What their practice may be have been I don't think is material here at all.

Mr. Kenny: Your honor, arguing to that objection, I think it is in an economy period such as we are in, if the Federal Government can obtain these lists free that it should try to do so. I am merely asking if Mr. Smith exhausted his opportunities of obtaining it for free.

The Court: I do not think he is under any obligation, nor is any official of the Government, to go around and beg for these things of the various officials. However, I have let everything else in so I might just as well let that in.

Mr. Kenny: I am not asking him if he begged, your Honor. I think your Honor and I can take judicial notice that you can get it for free if you know a member of the Board of Supervisors. [656]

The Court: And if they consider your prominent enough politically and it might swing a few votes in their direction, they might give you a list that had cost the County \$1000 or \$923, whatever it is.

Mr. Kenny: I think your Honor is assuming something not in evidence. The County already had the list, they had paid the money for it, it doesn't cost the County anything.

Q. You didn't inquire of the Board of Supervisors whether or not they would make a list available to the Federal Government?

(Testimony of Edmund L. Smith.)

The Court: Did you make any inquiry of any member of the Board of Supervisors?

The Witness: I did not. I assumed that we would have to pay for it as we do a lot of other things. We have had experience in the past, except where Federal judges in the past have been furnished, the same as the Superior Court judges, with sets of the California Reports.

The Court: You mean free?

The Witness: The Federal judges used to get them free. Now I don't believe they get them free any more.

The Court: I can state that they do not.

The Witness: For that reason, that I assumed that we would have to pay for it, that and other analogous things, I didn't make the inquiry. I thought that would come up later. [657]

Mr. Kenny: That is all. Thank you.

The Court: Thank you.

Mr. Smith, we have proceeded here informally. Do you have any statement you wish to make to clarify your testimony?

The Witness: May I have that report?

Mr. Margolis: In connection with that report, your Honor, merely because it is interesting in this connection. I would like to point out that on page 2 of Exhibit 7 of the report from the Administrative Office of the United States Courts, it is stated that in New York the registry lists of voters had at least prior to 1941 been the primary source of names for jurors——

(Testimony of Edmund L. Smith.)

The Court: Do you have any objection to the report?

Mr. Margolis: To it being admitted in evidence?

The Court: Yes. If not, I will admit it.

Mr. Margolis: I think it is an outmoded method of practice and it ought to go in.

The Court: All right. It is in evidence now.

Mr. Calverley: I believe the witness wanted to refer to that, your Honor.

Mr. Margolis: Excuse me.

The Court: In other words, I do not think this witness should make an argument. We let Professor Robinson make a few arguments but I think we ought to confine the witness' [658] testimony to evidentiary matters. If there is any argument to make on it the United States Attorney I think can make it.

The Witness: This report—I merely wanted to identify it for the purposes of the record—as stated, it was sent out by the Director of the Administrative Offices to all United States Circuit and District judges and perhaps to the clerks, if not all, and in it he states:

“It occurred to me that the information might be of interest to many of the District Courts and call the report to the attention of the Judicial Conference of Senior Circuit Judges at its recent meeting. The conference authorized me to send the report to all Circuit and District judges. Accordingly I transmit a copy to each of you herewith.”

(Testimony of Edmund L. Smith.)

Referring to the second paragraph on page 2, in explaining the system used, and apparently still presently in practice in the Southern District of New York——

The Court: Mr. Clerk, the whole report is in evidence and unless there is some particular or specific thing there that has a bearing on your conduct, other than the whole report, why I do not think that you should start to read from it. If you do we will be reading back and forth from that report all day. [659]

Q. (By Mr. Calverley): Mr. Smith, you received Government's Exhibit 7, did you not?

A. That is not my copy. That is one of the judge's copies.

Q. I noticed that it states it is the property of the chambers of United States District Judge Ben Harrison. Is that where you obtained it?

A. Yes.

The Court: I understood you to testify, however, that you did see it on or about the time it was issued.

The Witness: Yes, in connection with this other report, which it antedated. The other report is in evidence, that report of September 1942 I believe.

The Court: All right.

The Witness: There is one statement I might make. The reason for using these cards, since it has been inquired by the Court, using the available drawers, there is a list of jurors who mostly have qualified as competent and have served or not served

(Testimony of Edmund L. Smith.)

under the orders, statutes, state and Federal, from prior juries—involving lists of prior jury commissioners and clerks and under the direction of this court. It was therefore thought by me that it was a good source of competent, impartial and qualified jurors by eliminating as many as possible of the incompetent and those claiming exemptions. [660]

The Court: Do you have some more questions?

Mr. Margolis: Just a couple in connection with Exhibit 7.

Q. You have read and studied another copy of the documents which is in evidence here as Exhibit 7?

A. I have read a lot in connection with that same thing and this other report referred to dated September 1942. I haven't studied it, I might say. I have read it in the past.

Q. Has this report helped guide you in your work in the manner of selecting jurors?

A. It has helped guide me in avoiding a lot of—and it was discussed, that system was discussed at the time we inaugurated the questionnaires and the questions to be incorporated in that questionnaire.

Q. And you have attempted generally to follow the principles laid down in this report, is that right?

A. Generally speaking as to the questionnaire and eliminating the personal interview.

Q. How about the other matters in the report?

A. The former we haven't attempted to use.

Q. How about the matters as to the type of jurors that the report refers to as desirable?

(Testimony of Edmund L. Smith.)

A. I don't agree with that conclusion and entirely with the method at all. [661]

Q. Now this report says that in New York one of the greatest difficulties with juries has been that due to general economic conditions in New York the panel was overcrowded with relief workers and housewives. Another one was that most of the better quality of jurors was seeking to be excused because of the unfavorable physical surroundings in which they were required to serve and because they were called at times when it was impossible for them to leave their business activities. Have you had complaints of that kind from prospective jurors?

A. No.

Q. You haven't had that problem?

A. No.

The Court: You mean jurors haven't complained about being called away from their business?

The Witness: Oh, called away from their business.

Q. (By Mr. Margolis): How about other physical surroundings or perhaps having to associate with undesirable persons from the standpoint of some of the prospective jurors?

The Court: Does that report say that?

Mr. Margolis: Well, it doesn't but I think it is pretty implicit in the report.

Q. Aside from the report, have you had any complaint?

(Testimony of Edmund L. Smith.)

A. That refers to the condition prior to establishing that jurors' club room that they refer to in there. I don't know what the physical conditions of the court for the accommodation of jurors was prior to that.

Q. You haven't had that problem here at all, is that right?

A. Not to that extent at all.

Q. Have you had it at all?

A. Yes. When several juries have been out, or are waiting, witness rooms are crowded, jury rooms, or places to accommodate the juries. Of course I haven't heard any complaints that I recollect.

* * *

ARVIN H. BROWN,

recalled as a witness, having been previously duly sworn, was examined and testified as follows: [663]

Direct Examination

By Mr. Kenny:

Q. Mr. Brown, do you recall having been a witness in the case of United States v William H. C. Jackson, numbered 13999-M, in the records of the Clerk of this court, on the 24th day of July 1939?

A. I can't identify it by the name and the number or the date, but I remember being a witness in the case.

* * *

(Testimony of Arvin H. Brown)

Q. (By Mr. Kenny): I have before me here a clipping from the Los Angeles Examiner for the following day, and it might refresh your recollection of the event if I read this to you. This is the Los Angeles Examiner of January 25, 1939:

“Arvin H. Brown, Federal Jury Commissioner, stated he obtained the names of prospective jurors and trial jurors from various sources, including assessor’s lists, personal property returns, bank personnel, telephone classified directories, various clubs and the Blue Book.

“‘Isn’t the Blue Book a social register?’ Irwin asked (Irwin is Attorney John J. Irwin previously referred to in this news account).’

“‘Well, I understand anybody can get in it for \$3,’ Brown replied.”

Does that refresh your recollection of the incident?

A. Yes, it does. I was just going to say that I made that statement in a spirit of levity and hoped it would be taken that way, but I considered the Southwest Blue Book a very fine publication in its class. As I testified here, I think it would be classified as a social register.

Q. Now, Mr. Brown, do you recall any remarks that were made by Judge McCormick at that time regarding your use of the Blue Book or of club registers?

A. No, I don’t.

* * *

(Testimony of Arvin H. Brown)

The Court: Do you recall whether or not he did say anything?

The Witness: You mean about the use of these things?

The Court: Yes.

The Witness: I don't recall anything.

The Court: Did Judge McCormick ever tell you not to use the Blue Book?

The Witness: Oh, no. I think I would have remembered that because I don't think the judge has ever suggested to me about not using lists.

The Court: Now you testified the other day that you got names in 1943, and then you testified you had used the Blue Book once before? [665]

The Witness: Yes, sir.

The Court: But that you didn't remember the year. Now in view of this question by counsel, is your recollection now refreshed as to whether or not that is the year you used it or a previous one?

The Witness: No, I feel that that was a statement that I was making covering my tenure of office from the beginning up to that time.

The Court: I see. All right.

Mr. Kenny: Just one other question, Mr. Brown.

Q. The question I asked you included the reference to your use of lists of bank personnel?

A. That is right.

Q. Can you tell us just what use was made of lists of bank personnel?

A. What use?

Q. Yes, or what list you obtained and what you did with it in the practice during that period.

(Testimony of Arvin H. Brown)

A. I thought of the idea of getting some of the tellers and employees of the bank that would not be key figures, and I was able to get a list from one of the banks in town covering that. I took the list to the clerk—it was Mr. Zimmerman, I believe; it was before Mr. Smith—that was quite a number of years ago, and turned it over to him. [666]

Mr. Kenny: Thank you.

The Court: Is that all?

Cross-Examination

By Mr. Calverley:

Q. Mr. Brown, you testified that you obtained a great many of these names from the Los Angeles telephone directory. I have the current issue of that directory in my hand, November, 1946. This is the type of directory you used in making the selections?

A. It is, but it might not be that year.

Q. But it is published by the Southern California Telephone Company?

A. That is right.

Mr. Calverley: I will offer this as a Government's exhibit, as indicative of the source from which Mr. Brown obtained the bulk of his names.

Mr. Margolis: No objection.

Mr. Garrett: I am going to object to that offer on the ground it is incompetent, irrelevant and immaterial. I believe that the use of that directory is apt to be purposely misleading—or rather misleading without the purposely—there is no testimony that this particular directory published at the end of 1946 was ever used. This directory is,

(Testimony of Arvin H. Brown)

as everyone knows and there has been public comment on it and announcements by the telephone company as a result of it, [667] this directory is, as everyone knows, approximately one-third larger than any telephone directory ever published in this area before it, or any telephone directory ever used by this witness.

Your Honor will recall that the telephone company has announced that on account of the size of this new directory that it is contemplated that district directories will be used in the future.

The Court: It is only offered for the type, just the same as the defendants offered the Southwest Blue Book of 1947 for the type. Is that what your purpose was in offering the Blue Book, Mr. Margolis? It was for the type, and it wasn't for the names?

Mr. Margolis: I understood that to be the purpose, and not to indicate the size.

The Court: It was your purpose in the Southwest Blue Book to indicate as to the type of the book?

Mr. Margolis: Yes. And I stated I have no objection to the telephone directory, your Honor.

The Court: All right. The objection is overruled. It is admitted in evidence.

The Clerk: No. 8.

(The telephone book referred to was received in evidence and marked Government's Exhibit No. 8.) [668]

Mr. Margolis: * * *

I want to say that the defendants have pleaded not guilty, which puts of course all of the allegations of the indictment in issue, but at this time the defendants, for the [670] purposes of this motion or for the purpose of these proceedings generally, admit that each of the defendants are members of the—at least I am making this on behalf of the defendants we represent—International Fishermen & Allied Workers of America. That is not true with regard to the defendant Mr. Garrett is representing.

I also want to draw your Honor's attention to two other things. At this time, your Honor please, so that the record may be entirely clear, I want to re-offer each and every exhibit and every part of every exhibit which has been marked for identification and has been offered by the defendants but which has not yet been admitted in evidence.

* * *

I assume that your Honor still wishes to reserve ruling on the matter?

The Court: Yes.

Mr. Margolis: I also want to ask leave at this time to amend the motion in certain particulars. I might state that it is amended from our viewpoint to conform to the proof. At the time that the motion was originally prepared we did not have all of the exhibits that we are offering now.

I ask to amend the motion, or ask leave to amend the motion, by inserting on page 2, line 5, of the notice of motion, immediately following the word

“laborers” the following words, “operatives and kindred workers, domestic workers, service workers.” That is the end of that insert.

Then on line 6 to insert immediately following the words “members of labor unions” the words “Americans of Mexican descent.” That is the end of that insert.

Then on line 7 of the same page, immediately following the words “and were excluded from” the words “and that proprietors, managers and officials were systematically and intentionally favored in.”

I offer these amendments either by way of insertion or, if the order is granted, I will be glad to file an amended motion so that it will not be necessary to—I think that the motion can be clear and easy to follow, or I can write it in, if the motion is granted, whichever the Court prefers. I do not have at this time prepared a typewritten amended motion.

The Court: Well, ordinarily I do not see any objection to the granting of motions to amend. I would not want to be understood, however, in granting the motion to amend on the ground that it was granted to conform to the evidence.

Mr. Margolis: I understand, your Honor. I merely made that statement. At the time this motion was prepared we did not have all of the information that we have now. [672]

The Court: Is there any objection to it?

Mr. Calverley: Your Honor, we don't feel that this motion to amend is timely made. The motion itself was filed late, and this amendment opens up matters that we received no warning of before the

motion was filed, and it so happens that as a result of this inquiry that certain matters were gone into indirectly that are not mentioned in the motion itself.

The Court: Yes. I think there is something to that. You want to add domestics—what was that—operatives, service workers and domestic workers?

Mr. Margolis: Operatives and kindred workers, domestic workers, service workers. That is on line 6.

All of these matters having been gone into, I can't see how counsel can claim that there is any surprise.

The Court: Operatives and kindred workers, domestic workers?

Mr. Margolis: And service workers.

The Court: And service workers.

Then members of labor unions, Americans of Mexican descent?

Mr. Margolis: That is correct.

The Court: What was the other? Systematically and intentionally discriminated against and were excluded from the list of persons? [673]

Mr. Margolis: Immediately after the word "from" on line 7, your Honor, and that proprietors, managers and officials were systematically and intentionally favored. It is merely the other side of the coin.

The Court: Well, counsel for the Government in asking his question of both Mr. Smith and Mr. Brown limited his interrogation to the bases of your allegations here, as I remember. He asked them whether or not they had included in these members of labor unions. He did not broaden out the field as

to the others. There is testimony in the record as to what they have done, whatever they have done in so far as the gathering of the lists is concerned, but in so far as they might be enabled to prepare to controvert whether or not they systematically and intentionally discriminated against operatives and kindred workers, service workers, domestic workers, and Mexicans of American descent, that is a new charge.

Mr. Margolis: I am perfectly willing to stipulate, your Honor, that both Mr. Smith and Mr. Brown would receive, if they were asked the questions, that they had no intention or purpose in discriminating against any of the groups or in favor of any of the groups.

The Court: I don't know that that would cure it in the present state of the record. For instance, as to Negroes you asked, and I think somebody asked Mr. Brown, and also [674] about Japanese, what he did. He went down to a Negro preacher.

Mr. Margolis: He was asked what he did about Mexicans—I asked him myself—and he said he didn't do anything especially about them. He didn't know of any organization.

Now the point with regard to operatives and kindred workers, domestic workers and service workers was all offered in our exhibits. Of course I do concede that counsel is at a disadvantage because it hasn't been determined yet whether or not those exhibits will be admitted.

But assuming that those exhibits are admitted, there certainly has been—we have put on proof on

these points and, as I understand it, there is no intention, assuming that the exhibits are admitted, to controvert or to attempt to controvert those exhibits by any other evidence. Actually I have done this out of perhaps an excess of caution in order that the motion may be entirely clear.

The word "laborers" could well be taken to include many of these categories. I merely am using the terms which the census bureau has used in order that my motion may conform with the terms that were used here. I think actually that the terms are broad enough probably in one sense to include all of these categories, yet they are not the specific terms where they are used as terms of art by the census bureau which have gotten in here into evidence in that connotation. [675] I want my motion to be entirely clear. I think if we had not used those terms of art in the census bureau that my motion would be clear as covering all of these categories of workers.

The category, members of labor unions, we know, your Honor, that members of labor unions are concentrated, at least as far as the CIO is concerned, in the mass industries and those are the operatives and kindred workers. I don't think anybody would be misled by this original motion and the original purpose of this, as I say, is because in the course of this presentation certain terms of art were used, terms of art used by the census bureau, used scientifically, and I wanted the motion to be entirely clear with relations to those terms of art.

Mr. Calverley: If the Court please, we feel that counsel is attempting to broaden this motion beyond all justification. In so far as any surprise is concerned, the classifications used by the census was brought out in the testimony of the witness, and that there are people of low incomes in many of these classifications. They seem to cut across classifications, and those at the bottom, in Class K for example, do not include all of the low income groups at all. Also the membership in labor unions cuts across the eleven major classes.

The Court: I think that your motion as made is probably broad enough to frame the issues here that have been mentioned. [676]

Mr. Margolis: I think it is, your Honor, and, as I say, just because these terms have been used, I think that in the event the matter should ever go up that it would simply relate the motion to the evidence and the terms that have been used and I think it would clarify the record. I think it would be of assistance to everybody.

* * *

The Court: I would like to follow the policy of allowing as liberal pleadings as can be done, but I think that your motion is broad enough to frame the issue, and if this is included it will narrow the broader issues that you have into issues which the Government would be justified in asking permission to re-open.

Mr. Garrett: The Government hasn't put on their case yet. [677]

Mr. Margolis: The Government hasn't put on their case. I am making this motion at the close of our case, not at the close of the Government's case.

The Court: I understood that the Government was through. Have you any witnesses?

Mr. Calverley: We don't expect to call any.

Mr. Margolis: We haven't closed yet. It is a matter of the Government's own choice. The Government hasn't started yet. Maybe the Government will be through before it starts. But as far as we are concerned, we have not yet rested and the Government will have every opportunity to meet this.

Mr. Dixon: We understood that he had rested, your Honor, subject to argument.

Mr. Margolis: I said I had two or three things that I wanted to do before I rested. [678]

* * *

JOHN J. IRWIN

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: John J. Irwin; I-r-w-i-n.

Direct Examination

By Mr. Garrett:

Q. Is that a file on the Jackson case before you, Mr. Irwin?

A. It is, Mr. Garrett.

Q. While you have it before you, will you inspect it, Mr. Irwin? [679]

(Testimony of John J. Irwin.)

A. I looked it over the other day with you, Mr. Garrett, last Friday. I am familiar with the contents.

Q. Will you state your name and occupation?

A. John J. Irwin, I-r-w-i-n, attorney at law; address, 5658 Wilshire Boulevard, Los Angeles.

Q. Are you licensed to practice in this court, Mr. Irwin? A. I am, sir.

Q. For how long have you been so licensed?

A. For 14 years; 1932.

Q. Do you recall this case of *People v. Jackson*, Mr. Irwin? A. Very well.

Q. Did you represent any of the parties there?

A. I was appointed by the court to represent William H. C. Jackson. I might state that that was the second case in which I had been appointed to represent him. There were two cases.

The Court: Same man?

The Witness: Yes, sir.

Q. (By Mr. Garrett): That file shows you presented a motion in the form of a challenge to the trial panel in that case. Will you inspect that motion or challenge and see if you can identify it in the file? [680]

A. I can. I looked it over again and I now look at it and that motion to quash the indictment, consisting of two pages, with my signature—it is my signature—was prepared and filed by me in this court. It is Case No. 13999-M.

Mr. Garrett: May it be admitted by reference, your Honor?

The Court: Admitted.

(Testimony of John J. Irwin.)

Q. (By Mr. Garrett): Now, Mr. Irwin, we had a conversation, if you will recall, concerning certain proceedings which were had upon the hearing of that challenge to the panel. I might state for your information to Mr. Kenny and I have represented to the Court that since that conversation with you we had last Friday, or last Thursday, we have had the notebooks of stenographic records searched by the reporter in that courtroom at the time of the hearing I am referring to, Mr. G. M. Fox, and he has been unable to locate his notes on that hearing. It was before Judge McCormick. The record shows that Mr. Brown, jury commissioner, was examined. Do you recall that, Mr. Irwin.

A. Very well, Mr. Garrett.

Q. Does the record show whether or not Mr. Zimmerman was examined?

A. I don't know, but I recall definitely that he did testify, as did Mr. William Fleet Palmer. [681]

Q. Do you have a recollection of the testimony that was given and the observations of the Court in connection with the motion on that day?

A. Since this happened so long ago, and, as Court and counsel know, attorneys have a great many matters, would it be pertinent to say why I recall this particularly, your Honor?

The Court: No.

The Witness: Shall I proceed directly?

Q. (By Mr. Garrett): You do have a recollection, do you, Mr. Irwin?

A. I do; yes, sir.

(Testimony of John J. Irwin.)

Q. Had you been prior to the trial of this case in any official position in this Division?

A. In this District, you mean?

Q. In this District; yes.

A. Yes, sir. I was Assistant United States Attorney in 1933 to 1937.

Q. And this Jackson case, the incidents of that case were how long from your departure from the United States District Attorney's office?

A. About two years.

Q. It was two years? A. Yes.

Q. For some reason or other you remember the case, do you? [682]

A. I do; yes, sir.

Q. You haven't got the benefit of the stenographer's notes here, Mr. Irwin, and we would appreciate your telling us the best of your recollection just what happened here.

A. This William Jackson was his true name. The reason I remember him, he was also known as Haifi Tashira, and he claimed to be the prophet of the Lost Tribe of Israel. He was a colored gentleman, and there was the first indictment charging perjury in connection with matters pending before the immigration authorities. That was before Judge Hollzer. He called me and asked me, because of the nature of the matter, if I would act in the case, which I did.

Then this indictment was returned charging him with violation of the Mann Act, after we acquitted Mr. Tashira before Judge Hollzer. I was appointed

(Testimony of John J. Irwin.)

in that case, in this current case, and after going into it in some detail I decided to file the instant motion.

I prepared subpoenas duces tecum in support of it, arranged for the appearance of the jury commissioner and the clerk, to support the motion, and there was testimony had before Judge McCormick.

Do I understand your question as it is now framed comprehends my giving the substance of what was testified to at that hearing?

Q. As you recall it, Mr. Irwin; yes. [683]

By the way, before you go into that, the subpoena duces tecum you have referred to is in the file there, is it not?

A. I see an order granting the subpoena dated July 21; yes, sir.

The Court: Who is it directed to?

Q. (By Mr. Garrett): Are the papers required by that subpoena duces tecum, were they produced, Mr. Irwin?

A. First may I answer your Honor's question. It was directed to R. S. Zimmerman, Clerk of the United States District Court, Arvin H. Brown, jury commissioner. I had asked to get certain other people, which Judge McCormick declined and struck out. Those were the only two granted.

It is my recollection that I asked for the production of records showing the manner in which the jury panel was selected in this District.

Q. Now those papers, were they produced in court, as far as you recall?

(Testimony of John J. Irwin.)

A. My recollection isn't so clear as to what was produced by way of records as to what the testimony was of Mr. Brown and Mr. Zimmerman. That I shall never forget.

Q. Will you please state, according to your recollection, what that was?

Mr. Calverley: If the Court please, I think this is going pretty far afield. I object to it on the ground it is [684] incompetent, irrelevant and immaterial.

The Court: What is the purpose of it?

Mr. Garrett: It is testimony, your Honor, please, on precisely the same point on which testimony had been offered by both of the named witnesses in this cause before you and relating to the same matter.

The Court: Is it contrary to their testimony?

Mr. Garrett: I represent that it is.

The Court: All right. Objection overruled.

* * *

The Witness: In seeking to support the motion, questions were propounded to Mr. Brown and to Mr. Zimmerman which elicited in substance the information that the jury panel for this court was selected by reference to the membership lists of athletic clubs, country clubs, particularly do I recall reference to the Blue Book and similar types of organizations here in Los Angeles.

Then I recall in opposition—the motion was denied—I recall in opposition Mr. Palmer testified that he had a recollection that there had been at some time in his service a colored person on the

(Testimony of John J. Irwin.)

jury, and the motion was denied, and I recall that the comment from Judge McCormick was that the manner of selecting the jury certainly was open to criticism and should be corrected. [685]

Mr. Garrett: No further questions.

Mr. Calverley: If the Court please, I move to strike this witness' testimony on the ground that there hasn't been any impeachment here of anything that has been heretofore testified to.

The Court: No, there hasn't.

Mr. Garrett: I desire to point out——

The Court: Have you stated all of Mr. Brown's testimony? Is that the only place he testified he got the names from?

The Witness: Let me see, your Honor. I will try and be as complete as I can.

As I recollect, if your Honor will recall my motion was directly mainly because of the colored situation—it was a colored party—and my recollection was that they said that they got them from the clubs, he mentioned the clubs, and as I say, that Blue Book.

The Court: Did he mention the telephone directory?

The Witness: I believe—let's see—I wouldn't say he did not. That is as I recall what he testified to.

The Court: Why don't you refresh the witness' recollection with this newspaper article that you read?

(Testimony of John J. Irwin.)

Mr. Garrett: I shall be pleased to do that, your Honor? [686]

* * *

The Court: I think it may be admissible, but I doubt whether it is impeachment. However, we can't come to that at the present time. The objection to the testimony will be overruled.

* * *

Mr. Garrett: Your Honor suggested that I show this newspaper article to the witness. I would like to have his [687] unassisted recollection first, however, and I would like to ask at this time, your Honor, of the witness, whether the witness has any further independent recollection of the statements made either in evidence by the witnesses or from the bench by Judge McCormick.

The Witness: The testimony that I have given, Mr. Garrett, is substantially my recollection of what transpired at that time.

The Court: What did Mr. Zimmerman testify to?

The Witness: As I recall, Mr. Zimmerman testified, your Honor, to the manner in which Mr. Brown and himself got together and——

The Court: Did he testify where he got the names or did he testify as to whether or not he got any names?

The Witness: It is my impression, sir, that Mr. Brown was the one who came up with the names as a jury commissioner——

The Court: Not your impression.

(Testimony of John J. Irwin.)

The Witness: It is my recollection, sir, and I could be wrong, that it was Mr. Brown who supplied the names and that he and Mr. Zimmerman sat down together and went over the names and from that group lists were selected which were put in and from that certain numbers were withdrawn.

Q. (By Mr. Garrett): Now, Mr. Irwin, with the hope of eliciting any [688] further recollection that you may have, I am going to show you a current newspaper article that we have here, evidently taken from the local press as of July 25, 1939. I will indicate that article, Mr. Irwin. It is before you now.

A. Are you referring to what appears to be a book of clippings?

Q. Yes, that is right. We got that from the press room.

A. The article entitled "Prophet Held for Trial on Slave Charge," is that right?

Q. Yes.

A. It appears to be page 81 of this book.

* * *

Q. Will you read it over and see whether after reading it over your recollection is refreshed so that you are able to testify to any further evidence or statements made at the hearing in that case concerning which you testified?

A. I have read the article, Mr. Garrett.

Q. Does reading of that article refresh your recollection in any way?

(Testimony of John J. Irwin.)

A. It does to a certain extent, that is to say, that it broadens my recollection as to the sources of where Mr. Brown testified he got his names from, and this quote of [689] Judge McCormick's, that is not all-inclusive.

Q. You mean to say that Judge McCormick said other things besides those quoted in that newspaper article?

A. As I have testified, and that is my recollection.

Q. Now after reading that article and refreshing your recollection, can you testify any further as to things not mentioned by you before but recollected by you now?

A. Yes. I think I should say, Mr. Garrett, that I do not recall, having looked at this article, that Mr. Brown testified that in addition to the sources of information, that names were secured by reference to the assessor's lists, of personal property returns, which I understand is people who make returns of securities, and so forth, bank personnel, telephone classified directories—I have testified to clubs and blue books. So I think having looked at this I should amplify my testimony that I do now recollect that he did say that those various sources of information were referred to.

The Court: Did he say when he got these names from the clubs, how recently prior to 1939?

The Witness: My recollection, your Honor, is that it was a continuing proposition, that every so often they sat down. In other words, some people

(Testimony of John J. Irwin.)

died and they had to use those lists for years, as I understood it, from time immemorial.

The Court: But that he went to the clubs and just kept [690] on year after year, or do you recall what he testified to as to that?

The Witness: As to how often he referred to them? I do not.

The Court: You do not?

The Witness: How often he went to them? No sir.

The Court: Does that refresh your recollection about anything else that Judge McCormick said, or is that material to this inquiry?

Mr. Kenny: I think that is the principal, at least for our clients, we think that that is the most material on the theory that the jury commissioner is already on notice of the criticism of this court.

The Court: I think perhaps I can say now that any judge can say tomorrow, or as to anything that we could do, any judge could sit down and say that the methods of picking jurors could be improved, and when the time comes when no judge is able to say that why then we will have reached a static point in our society that it will break, whenever we reach the point that we can't improve.

Mr. Kenny: But, your Honor, this witness was told that the things he was doing then could be improved and he didn't improve them, he remained static. That is the point of this testimony.

The Court: We will have to argue the evidence in that case later. [691]

(Testimony of John J. Irwin.)

Mr. Garrett: As to the witness, your Honor, I think I should ask whether any further recollection remains in his mind, and I do ask that, Mr. Irwin, beyond what you now have told us.

The Witness: I have nothing to recollect except what I have added after looking at this article.

Mr. Garrett: Your witness:

Cross-Examination

By Mr. Calverley:

Q. Mr. Irwin, do you recall any testimony by Mr. Brown or Mr. Zimmerman as to the portion of names obtained from the telephone directory or from these clubs?

A. I do not, Mr. Calverley. It was the net result that sticks out in my mind. The exact proportions I do not know.

Q. Do you recall whether or not Judge McCormick directed the jury commissioner to make any change in his method of selection?

A. Thus far back I wouldn't want to say positively. I certainly don't want to quote Judge McCormick.

Q. To the best of your recollection, that he commented to the effect that the method could be improved because it was subject to some criticism?

A. And that the scope should be enlarged, that is my [692] general impression, to include people in all classes and walks of life. I noticed that at the next term of court they had some colored people on the grand jury.

(Testimony of John J. Irwin.)

Q. You testified to personal property returns, having reference to persons who had securities. Do you recall any testimony as to whether or not they had securities or just personal property returns on furniture or anything else that a man might have?

A. I think your question is probably put better than I did it. I think as it appears here in this quote it was probably the exact way that it was, assessor's lists of personal property returns.

* * *

Q. Now you have refreshed your recollection of Judge McCormick's comments from the comment appearing in that newspaper, is that right?

A. Well, my first testimony was my independent recollection, sir. I have read that article subsequently and I agree that that quotation was made by Judge McCormick, but as I stated I don't think that the quotation is all-inclusive. It included the remarks that I have just said to you, that it should be broadened and could well be the subject of criticism. In the instant case he said that there was no discrimination [693] and he denied the motion.

Mr. Calverley: May we have that quotation, your Honor, Judge McCormick's comments?

The Court: Do you want me to read it, Mr. Calverley?

Mr. Calverley: Yes.

The Court: Reading from a portion of the article heretofore identified by counsel and the witness:

(Testimony of John J. Irwin.)

“After hearing testimony, Judge McCormick said, ‘There has obviously been no discrimination or exclusion whatever in drawing the names of prospective jurors. Unless there should be something to indicate a substantial deviation from the rights and privileges guaranteed to all persons under the Constitution, it seems to me there is no merit in the defendant’s contention’. ”

Mr. Calverley: That is all.

Mr. Andersen: It is understood that the discrimination there referred to Negroes, your Honor.

* * *

Redirect Examination

By Mr. Kenny:

* * *

Q. Now that this has been read in the record, I wonder if that brought to his mind just what Judge McCormick said in that connection.

A. That is right. After this quote here, I recall his stating, in substance, that he thought that it could well be broadened and it might be the subject of criticism and that it should be broadened to include a more general representation of the citizenry of Southern California, something to that effect. That is my best recollection.

* * *

Mr. Margolis: I renew my motion now to amend.
The Court: The motion is denied.

* * *

Mr. Calverley: If the Court please, there are a number of exhibits here that are not in evidence and we have objected to their introduction. I am referring to Exhibits W-1, X-1, X-2, Y-1, Y-2, Z-1, Z-2, AA-1, AA-2, BB, CC-1, CC-2, DD-1——[695]

The Court: Down to II.

Mr. Calverley: Down to II, as appearing on the list that the Clerk has given me. We objected to the introduction of those exhibits on the ground that there was a lack of foundation. We at this time move to strike the testimony of the witness Robinson on the ground——

The Court: As to those exhibits?

Mr. Calverley: As to these exhibits, your Honor.

The Court: Only not limited to anything else.

Mr. Calverley: As to these exhibits only, on the ground that these exhibits are not records kept in the usual course of business, they are made by an individual under his direction who, he testified, was employed by defense counsel. The figures contained in these exhibits were not personally prepared by the witness himself. He testified that he relied upon what was told him by others.

Therefore as to these exhibits, the testimony of the witness Robinson would be hearsay based upon hearsay. For that reason we feel that there is a lack of foundation.

Also we renew the ground previously stated, that the witness did not make any examination of the basic source from which these names were obtained, namely, the 25,000 or 30,000 names which remained in the files of the clerk from which the names of prospective jurors were drawn. [696]

Also, if the Court please, we believe that the remaining testimony of the witness Robinson should be stricken on the ground that it is incompetent, irrelevant and immaterial, in that it is an attempt to approach this problem by a process of deductive reasoning, going from effect to cause, which was not the procedure followed in the case of *Thiel v. Southern Pacific Company*. And it is our view that the case of *Smith v. Texas* relied upon by the defendants in support of this method of approach, namely, the deductive approach to the problem, is not in point for the reason that, as has heretofore been indicated, *Smith v. Texas* was a racial problem wherein the Fourteenth Amendment to the Constitution was involved. In this case and in the *Thiel* case it was simply a matter——

The Court: One was the equal protection clause of the Fourteenth Amendment.

Mr. Calverley: That is correct.

The Court: There is no equal protection clause in the first ten amendments or in the Constitution as far as the Federal Government is concerned.

Mr. Calverley: And the requirement of the Constitution being only that the jury be impartial. The designation in the *Thiel* case that a jury should be selected from a cross-section of the community is based upon good administrative procedure in the Federal Courts, inconsistent with American ideals, and not because of the Constitutional rights of the persons involved, because in that particular case it apparently was immaterial that the actual jury selected contained five individuals who were in sym-

pathy with the economic group in which the appellant belonged. Therefore we feel that this evidence, a deductive process of reasoning, doesn't apply where you do not have a constitutional question.

Now counsel has indicated that there is a constitutional question involved in this case because the defendants are in the class discriminated against, as Smith was in *Smith v. Texas*. But that, as I have indicated heretofore, is an issue in this case, because in paragraph 11 of the indictment it is contended that they are not laborers but are in fact proprietors and independent businessmen.

Mr. Margolis: Your Honor, I would like the opportunity of answering all of that in the course of my argument on this matter rather than take it up piecemeal at this time. I intend to go into all of those questions.

The Court: The question is on the objection to the introduction of the exhibits and on the motion to strike all of the witness Robinson's testimony.

Mr. Margolis: I suggest, your Honor, that a ruling might be reserved until we have had an opportunity to argue the whole matter.

The Court: No, I think I am prepared to rule on it now.

Mr. Garrett: May I be heard, your Honor, if the matter [698] is to be decided today? I am under a necessity of making an appearance, if your Honor please, in the Superior Court this afternoon and if there is to be a ruling——

The Court: I think pretty nearly everything has been said in connection with the admissibility of this testimony and of these exhibits.

Mr. Margolis: I want to say, your Honor, that I haven't even purported to present the argument which I do have on this matter.

The Court: On the admissibility of his testimony?

Mr. Margolis: Yes, your Honor. I think that all of these points which counsel has raised here require an extended discussion of the law. I submit that the analysis of the law which has been made is just as inconsistent with the cases, when they are actually analyzed, not merely a few sentences superficially read, and the reason that I don't want to argue this objection separately—although I will do so if your Honor wants me to, or will permit argument on it—is because the presentation of this argument requires an analysis of all the cases on the subject and of the entire subject that we are talking about, and could better be presented as part of the entire argument on this subject.

However, if your Honor wants the argument on it separately, I think we should have an opportunity to present our argument, and I will say that the argument will be fairly extensive because it will not be based upon reading one or [699] two sentences from one case, but upon an analysis of all of these cases and what they mean with relation to the facts of the cases, an analysis of both the majority and the dissenting opinions in these cases, and we also take the position, your Honor, that there is a constitutional question involved here. We are prepared to argue that at considerable length.

Now all of these matters go to the very heart of the objection.

The Court: As I was about to say, and as I indicated at the commencement of this hearing, the Supreme Court by its Thiel case and by its opinions in the Ballard case and the Glasser cases, has left the matter rather up in the air as far as procedure is concerned in the lower courts. The matter is not covered as to rules. There isn't any clear or definite or ascertainable or easily ascertainable standard as to what is relevant or material on such an inquiry as this in any of the proceedings nor in any of these decisions, nor is there any statute which can be found upon the subject which the Supreme Court followed or relied upon.

The basis of their opinion in the McNabb case, which they relied on in the Ballard case and in the Thiel case as well, was not that there were violations of a rule, violations of a law, a deprivation of any constitutional right, but merely in the exercise of their power of supervision over the administration of justice in Federal Courts they saw fit to conclude in the Glasser case that there was no injury and that the man was not entitled to a reversal because there was an exclusion of a class, or rather the exclusion solely of one class, and they saw fit in the Thiel case to reverse a decision because, as they said, there was an exclusion of an economic class, and in the Ballard case because they said that men and women are not fungible.

In that connection, they apparently considered that a book was material in their decision and was

competent for them to consider because in connection with their decision they refer to a footnote:

“The problem is reflected in the discussions of the androcentric theory and the gynaeocentric theory in scientific literature. See War, Pure Sociology (1903), Ch. XIV; Draper et al., Human Constitution in Clinical Medicine (1944), Ch. VI.”

So I cannot find any statute which gives them the power of supervision over the administration of justice in Federal Courts in matters such as this. They have the power to prescribe rules, but they didn't prescribe anything in the rules, although they promulgated the rules after the decision in the *Glasser* case.

Also I cannot find anything, there being no statute, I cannot find anything in that statute to prescribe a boundary where I am to begin or to leave off, as to what they will [701] consider or what they will not consider, as to what is material and what is immaterial. And if these pamphlets and literatures on the gynaeocentric theory and the androcentric theory are material when the case finally gets to the Supreme court, I think howsoever slightly it might have to be regarded in so far as the weight of the testimony of Dr. Robinson is concerned—and I have serious doubts as to its having any probative value—I will have to conclude that nevertheless it is admissible. I will therefore overrule the objection as to the introduction of the exhibits and deny the motion to strike all of Dr. Robinson's testimony.

Now in that connection, I am mindful of the statement that I again read last night, where some elderly man said to a young man, "When you get to be a judge, your conclusions will probably be right, but your reasons will be wrong so do not state your reasons."

However, I have practiced law too long and I would like to give counsel the benefit of what is going on in my mind.

Mr. Margolis: I wanted to ask this, your Honor: Does that ruling mean that all of the exhibits that have been offered are now admitted?

The Court: Every exhibit that has been offered is in evidence. All of the testimony is in evidence.

(The following exhibits previously marked for identification were received in evidence:

Defendants' Exhibit D,
Defendants' Exhibit E,
Defendants' Exhibit W-1,
Defendants' Exhibit W-2,
Defendants' Exhibit X-1,
Defendants' Exhibit X-2,
Defendants' Exhibit Y-1,
Defendants' Exhibit Y-2,
Defendants' Exhibit Z-1,
Defendants' Exhibit Z-2,
Defendants' Exhibit AA-1,
Defendants' Exhibit AA-2,
Defendants' Exhibit BB
Defendants' Exhibit CC-1,
Defendants' Exhibit CC-2,

Defendants' Exhibit DD-1,
Defendants' Exhibit DD-2,
Defendants' Exhibit EE-1,
Defendants' Exhibit EE-2,
Defendants' Exhibit FF-1,
Defendants' Exhibit FF-2,
Defendants' Exhibit GG-1,
Defendants' Exhibit GG-2,
Defendants' Exhibit HH-1,
Defendants' Exhibit HH-2,
Defendants' Exhibit II,
Defendants' Exhibit JJ,
Defendants' Exhibit KK.) [703]

* * *

Los Angeles, California, March 12, 1947;
10:00 o'Clock a.m.

OPINION OF THE COURT

The Court: The defendants' motion to dismiss the indictment and their challenge and motion to strike out the entire trial jury panel are both based upon the same grounds. In view of the fact that the February 1946 grand jury which returned the indictment and the current trial jury panel were chosen from the names selected in the same method and manner by the jury commissioner and the clerk, the stipulation that the two motion might be heard together was approved.

Briefly stated, the contention is that the grand jury for the February 1946 term and the present trial jury panel were drawn in such manner that

the grand jury was "not an impartial grand jury" and that the trial jury panel was not "an impartial jury panel drawn from a cross-section of the community, but that certain defined groups of the community, to-wit: laborers, people working by the day or hour, members of labor unions and Negroes were systematically and intentionally discriminated against, and were excluded from the list of persons to serve" as grand jurors and trial jurors. It is further asserted that they were deprived of their right to an impartial grand jury and an impartial trial jury "without such exclusion and discrimination as against groups and [3*] classes of persons to which defendants belong."

While it might appear from the wording of the motion and the affidavit of one of the counsel filed in support of the motion that there was a willful and deliberate intent on the part of the clerk and the jury commissioner to effect such an alleged discrimination, it should be stated at this point that after the conclusion of the evidence and during the course of the argument Mr. Margolis, of defendants' counsel, stated that the defendants did not want anything in the argument or in the presentation of the evidence to indicate that they intended to impugn the motives or the desires of either Mr. Brown, the commissioner, or Mr. Smith, the clerk, and that there is nothing in the record which shows anything from the standpoint of personal motivation of either of them.

* Page numbering appearing at top of page of Reporter's certified Transcript of Opinion of the Court.

Be it also said that counsel for the defendants, in support of their motion, instead of limiting their tactics to merely an attack upon the methods used, have very commendably sought to produce by evidence and in argument suggestions which were calculated to aid the officials of this court charged with the very difficult task of selecting jurors, to find a better way than the one under assault.

It should also be stated that this is not a usual proceeding. So far as I can ascertain from the records of this court, of which I take judicial notice, only twice before has a challenge recently on somewhat the same grounds been made, [4] once in 1924 and once in 1939. From the records it appears that upon each of these occasions the motions were denied and no appeal taken. Such proceedings were, however, before the series of cases recently promulgated by the Supreme Court beginning with the case of *Smith v. Texas* (1940) 311 U. S. 128; *Glasser v. United States* (1942) 315 U. S. 50; *Hill v. Texas* (1942) 316 U. S. 400, and its companion case *Akins v. Texas* (1945) 325 U. S. 398, and culminating with *Thiel v. Southern Pacific* (May 20, 1946) 328 U. S. 411 and *Ballard v. U. S.* (December 9, 1946) 91 L. Ed. 922, 328 U. S.—.

The defendants contend that it is the rationale of those cases, not only that the deliberate and intentional exclusion by the clerk or the jury commissioner of persons having common characteristics by virtue of their employment, or their method, time or rate of pay, or religion, race, political, geographic location, or associations in social intercourse, is un-

lawful, but also that the use of a method or system of selection which, without intention so to do on the part of either of those officers, results in the exclusion of any such group having common characteristics is likewise unlawful.

They further contend that the use of any method, process or system of selection which results in the over-weighting by a larger percentage of one occupation than another among the actual jurors selected of persons from one group or "class" is likewise unlawful. The latter contention is more clear [5] if it is stated specifically. It is, that an "economic class" (arbitrarily designated by the defendants as proprietors, managers and officials) constitute more than 50 per cent of the grand jury and the trial jury panel under attack, whereas this so-called "economic class" actually constitutes but approximately 15 per cent of the population.

Any discussion of this problem necessarily begins with the Thiel case, which has been much discussed not only among the members of the bar but it is a matter of particular interest to the trial judge. In this connection, reference is made to the address by the Hon. Louis E. Goodman, United States District Judge, to the September 1946 Conference of Judges of the Ninth Circuit, and to Judge Harris' opinion in the Thiel case on its remand.

The difficulty in this proceeding has been to interpret and apply the statements, conclusions and apparent holdings of the majority opinion in that case to the practical realities with which the lower courts are confronted in the actual trial of lawsuits.

It is arguable that the Thiel case, in addition to deciding specifically that the act of the clerk and the jury commissioner was unlawful in "systematically and intentionally" excluding men who were paid by the day, also established several other very broad and far-reaching propositions, which may be generally stated as follows: [6]

1. That people who are paid at different times, that is, by the day, or hour, or week or month, or by the piece or otherwise, are in different "economic classes" than those paid differently, regardless of the similarity of their work, personality, background, experience, education, sex, race, religion, politics or other common characteristics. (In this connection, it may be noted that it is argued that that is the whole tenor of the opinion and the statement therein is particularly noted that "laborers who were paid weekly on monthly wages were placed on the jury lists," and the analysis of the majority opinion by Justice Frankfurter in his dissent is also noted in this connection.)

2. That women must be regarded as being in a separate economic "class" from their husbands, regardless of work, personality, background, experience, education, race, religion, politics or other common characteristics. (In this connection, the whole opinion and Justice Frankfurter's analysis of it in his dissent is noted, and particularly the fact that the jury lists contained "the wives of daily wage earners.")

3. That persons of the opposite sex, and persons who are in one "economic class," as a matter of law

without regard to the facts concerning an actual state of mind, are to be regarded as being incapable of being "impartial" to a litigant who is not of the same sex or in the same economic group [7] or class, regardless of similarity of work, background, experience, personality, education, race, religion, politics or other common characteristics. (In this connection, it is to be noted that the constitutional right is to an "impartial" jury, and economic or other class or status is material only as it goes to aid in securing such "impartial" jury.)

4. That if the foregoing three propositions are established by the majority opinion, then the clerk and jury commissioner are charged with the necessity of stratifying a community into "classes," with relation to their social affiliations, sex, religion, race, political affiliation, geographic location, economic status and occupation, and rate and time or method of payment for work done, in order that they may be sure not to devise a system which may exclude persons of a particular class.

While these propositions are not couched in the language used by the defendants in their motions, and are not a complete statement of all their points, they are nevertheless implicit to the legal position which they have taken in making the motions, and it is necessary that these propositions be stated and examined before proceeding further. The Thiel case either marks a fundamental change in what is meant by the right to a trial by an "impartial" jury as guaranteed by the Sixth Amendment or it is but an application of established principles to the

conduct of officials charged in the [8] Federal Courts with the difficult task of selecting jury lists.

It should be stated at this point that the subsequent decision in the Ballard case on December 9, 1946 (*supra*) does not aid in the application and interpretation of the Thiel case. In the first place, the majority opinion in the Ballard case, by quoting with approval a portion of the dissenting opinion of Judge Denman in the same case in the Circuit Court which suggested that the woman on the jury could "rationalize" the conduct of the defendant Mrs. Ballard, and the further statement in the Supreme Court majority opinion that such quotation "illustrates that the exclusion of women from jury panels may at time be highly prejudicial to the defendants," leaves a suggestion, without a definite holding to that effect, that a woman religionist (i. e. a class within a class) suffers actual prejudice amounting to a denial of a constitutional right to an "impartial" jury if women religionists (i. e. a class of occupation within the broader class of the same sex) did not actually sit on both the grand jury and the trial jury.

In the second place, the majority opinion in the Ballard case indicated that the jury was selected contrary to what was referred to as "prescribed standards" of jury selection, and also speaks of a "departure from the statutory scheme," with no reference whatever to any statute, rule or decision where those "standards" are "prescribed," or where any [9] "scheme" much less "the statutory scheme" for picking a jury which is a "truly repre-

sentative cross-section of the community" is set forth, or referred to, or can be found. The need of such standards and such scheme, or the impossibility of devising one which can be frozen into the language of a statute or rule, is emphasized by the fact that the defendants are challenging the panels in this case on the ground, among others, that it does not appear the lists contained any persons who were paid by the hour.

It is not inappropriate to note in this connection that the new Rules of Criminal Procedure were promulgated by the Supreme Court several years after their decision in the Glasser case (*supra* January 19, 1942) which indicated an awareness of the lack of any statutory scheme or prescribed standards in the Federal Courts, but that the new Rules of Criminal Procedure are entirely silent on the subject.

It is also not inappropriate to note that several years before the promulgation of the Rules of Criminal Procedure the Supreme Court in the McNabb case (March 1, 1943) asserted for the first time its "supervisory power over the administration of criminal justice in Federal Courts" in procedural matters without a previously promulgated rule or statute governing such procedure to guide the lower courts in the first instance.

However cogently it may be asserted that the four arguable [10] propositions above set forth must be spelled out of the majority opinion in the Thiel case, case, I feel that I must reject them. To accept them as binding authority upon the trial courts of the

United States would be to attribute to the Supreme Court an intention, not only to create classes and set one against the other, but actually in the administration of justice to create such confusion and chaos as to make it impossible for any clerk or jury commissioner, or a trial judge sitting in review of their action, to devise a method for the selection of jurors which would not be the subject of subsequent successful attack. To accede to these arguable contentions as to the holdings of that case, in addition to the chaos in the enforcement of criminal statutes as well as in the adjudication of civil rights, would be to eliminate all finality to any judgment depending upon the verdict of a jury or an indictment by a grand jury until the Supreme Court determined in each case whether or not the particular method or process of selecting jury panels for each jury excluded, or resulted in the exclusion of, what the Supreme Court might conclude at that particular moment of decision was a separate, economic, religious, racial, social, political or geographic "class" of persons.

These arguable conclusions must be further rejected for the reason that the Supreme Court based their decision in the case, not upon the ground that there was any substantial [11] prejudice to the appellant—and in this connection the harmless error statute was in the following months in the *Katteakos* case reaffirmed by the Supreme Court, not only in principle but actually in effect—nor did they base their ruling upon a holding that any rule of court or statute has been abridged or violated by either the

clerk or the jury commissioner or the court, nor upon the holding that any constitutional right was infringed, nor any constitutional question involved, but upon what they referred to as their "power of supervision over the administration of justice in the Federal Courts," without reference to any statute or constitutional provision which states or outlines such a power, so that lower court officials in selecting juries could have recourse to such a statutory source of power to determine if such a statute would furnish some guide in the classification of the various groups in the communities or methods for selecting jurors.

Moreover, to so hold would be against at least the rationale of the decision of the Thiel case which reversed the lower court's holding on the ground that it was in violation of "the American tradition of trial by jury." And certainly the American tradition of trial by jury, as well as all other American traditions, are based upon the proposition that under the law all effort shall be made to eliminate distinctions and discriminations between any possible groups and [12] prevent the formation of one "class" or more to set itself or themselves against any other "class." We are still dedicated to the proposition that "all men are created equal" as a self-evident truth.

Another reason why these arguable conclusions cannot be sustained is that the Thiel case must be interpreted and applied not alone in California, the state of its origin, but also in all of the other 48 states, each of which has constitutionally prescribed

its own set of standards of qualification, competency and exemption for jury service, which must be followed by the Federal Courts sitting in those several states, under the mandate of Section 411 of Title 28.

And finally these arguable conclusions must be rejected as the holding of the Supreme Court in the Thiel case because of their impossibility of application to the actualities of life, as illustrated in our attempt to apply them in this case. How can a clerk or jury commissioner or judge of a lower court in reviewing the acts of these officials know whether or not any "economic" or other group is included or excluded until they know, or have a way of knowing from some statute, into what economic or other classes the community is or should or can be divided? The only statutory norms at present are those which relate to political affiliations, geographic location, race, color or previous conditions of servitude, as set forth in Sections 412, 413 and 415 respectively [13] of Title 28.

In this connection, the defendants engaged the services of an assistant professor of sociology and statistics who, with people working under his direction, undertook an analysis and a breakdown into different "economic classes" of the grand and petit jury panels beginning with the February 1946 grand jury (which returned the indictment in this case) and continuing through the names of the jurors who were placed in the master jury box of the court for the term of the current grand and petit juries. The study involved an examination of all available questionnaires (about 1100), supplemented by in-

formation obtained from the city directory, voters' register and by personal telephone calls. The professor was called as an expert witness and testified at length. No effort was made by the witness (or otherwise by the defendants) to classify any of the members of any of the jury panels according to their racial, religious, social, sex, political or geographic status or characteristics, and the defendants, by the expert's testimony and otherwise, limited their evidence to an attempted classification by "economic" classes, or groups.

The classification of "economic" groups used by the witness was limited solely to the classification of employed persons used by the Census Bureau of the United States for the 1940 census, which is Tables 13 and 16 of the pamphlet entitled "The Labor Force for California 1940 Census." These [14] tables apply only to "employed persons" and list 167 occupations for employed males and 77 occupations for employed females. The witness used only the tables as applicable to males, and in his analyses placed all the females on the jury panels in the same occupational classification as their husbands, unless the questionnaire indicated a different one. This was done on the basis of his conclusions that wives generally had the same outlook and viewpoint as their husbands.

The 167 occupational classifications of the Census Bureau are reduced to 12 broad general classifications, and the witness in his analysis places all the persons in the panels in one or the other of these 12 classifications. As against those 167 occupational

classifications, the "Dictionary of Occupations," an official publication of the Department of Labor (1939 Edition) lists 29,000 occupations, of which 7000 occupations are broken into 12 very general broad classifications which follow somewhat the pattern, but actually differ from, the 12 classifications used in the Census Bureau. No data is available of which judicial notice can be taken, and no evidence was offered as to the classification or breakdown of employed persons into the method or time of payment for their work, whether by the hour, by the day, by the week, by the month or by the piece. One of the grounds of challenge by the defendants, as heretofore indicated, is that persons paid by the hour were excluded from the grand jury. Moreover, [15] as against the 167 classifications of occupations used by the witness, I examined about 350 of the questionnaires in evidence at random and listed about 250 different occupations stated by the jurors themselves on their questionnaires.

The 12 general classes of the 1940 census which the witness used, breaks the population as follows:

Under the heading "Professional and Semi-professional Workers" there are 26 occupations listed.

Under the heading "Farmers and Farm Managers" there is one occupation listed.

Under the heading "Proprietors, Managers and Officials, Except Farm," there are 15 occupations listed.

Under the heading "Clerical, Sales and Kindred Workers," there are 17 occupations listed.

Under the heading "Craftsmen, Foremen and Kindred Workers," there are 28 occupations listed.

Under the heading "Operatives and Kindred Workers, there are 38 occupations listed.

Under the heading "Domestic Service Workers" there is one occupation listed.

Under the heading "Farm Laborers" there is one occupation only listed.

Under the heading "Protective Service Workers" there are four occupations listed.

Under the heading "Service Workers, Except Domestic and [16] Protective" there are 10 occupations listed.

Under the heading "Laborers, Except Farm and Mine" there are 26 occupations listed.

It is to be observed, and it is important in the analysis of the testimony, that of the 12 categories only "Domestic Service Workers" and Farm Laborers" are limited to one occupation except for the category "Farmers and Farm Managers." All the others list numerous occupations.

The reporter will copy in the record at this point so that my remarks will be complete the classification of occupations as shown by Exhibit W-2.

A. Professional and Semi-Professional Workers

1. Actors
2. Architects
3. Artists and art teachers
4. Authors, editors and reporters
5. Chemists, assayers, and metallurgists
6. Clergymen

7. College presidents, professors and instructors
8. Dentists
9. Civil engineers
10. Electrical engineers
11. Mechanical engineers
12. Other technical engineers
13. Lawyers and judges [17]
14. Musicians and music teachers
15. Osteopaths
16. Pharmacists
17. Physicians and surgeons
18. Social and welfare workers
19. Teachers (n.e.c.) (including county agents)
20. Trained nurses and student nurses
21. Veterinarians
22. Other professional workers
23. Dancers, showmen and athletes
24. Designers and draftsmen
25. Surveyors
26. Other semi-professional workers

B. Farmers and Farm Managers

C. Proprietors, Managers, and Officials, except farm

1. Conductors, railroad
2. Postmaster, and misc. government officials
3. Other specified managers and officials
4. Props., mgr., and officials (n.e.c.) by industry:
 - a. Mining
 - b. Construction

- c. Manufacturing
- d. Transportation, communication and utilities
- e. Wholesale trade [18]
- f. Eating and drinking places
- g. Retail trade, except eating and drinking places
- h. Finance, insurance and real estate
- i. Business and repair services
- j. Personal services
- k. Miscellaneous industries and services

D. Clerical, Sales and Kindred Workers

- 1. Baggage men, express messengers and railway mail clerks
- 2. Bookkeepers, accountants, cashiers, and ticker agents
- 3. Mail carriers
- 4. Messengers, except express
- 5. Office machine operators
- 6. Shipping and receiving clerks
- 7. Stenographers, typists and secretaries
- 8. Telegraph operators
- 9. Telephone operators
- 10. Other clerical and kindred workers
- 11. Canvassers and solicitors
- 12. Hucksters and peddlers
- 13. Newsboys
- 14. Insurance agents and brokers
- 15. Real estate agents and brokers
- 16. Other sales agents and brokers
- 17. Other salesmen [19]

E. Craftsmen, Foreman and Kindred Workers

1. Bakers
2. Blacksmiths, forgers and hammermen
3. Boilermakers
4. Cabinetmakers and pattern makers
5. Carpenters
6. Compositors and typesetters
7. Electricians
8. Inspectors (n.e.c.: most inspectors in manufacturing are classified as operatives)
9. Locomotive engineers
10. Locomotive firemen
11. Machinists, millwrights and tool makers
12. Masons, tile setters and stonecutters
13. Mechanics and repairmen, and loom fixers
14. Molders, metal
15. Painters (construction, paperhangers and glaziers)
16. Plasterers and cement finishers
17. Plumbers and gas and steam fitters
18. Printing craftsmen, except compositors and typesetters
19. Rollers and roll hands, metal
20. Roofers and sheet metal workers
21. Shoemakers and repairers (not in factory)
22. Stationary engineers, cranemen, and hoistmen
23. Tailors and furriers [20]
24. Other craftsmen and kindred workers
25. Foremen
 - a. Construction

- b. Manufacturing
- c. Transportation
- d. Miscellaneous

F. Operatives and Kindred Workers

- 1. Apprentices
- 2. Attendants, filling station, parking lot and airport
- 3. Brakemen and switchmen, railroad
- 4. Chauffeurs, truck drivers and deliverymen
- 5. Conductors, bus and street railway
- 6. Dressmakers and seamstresses (not in factory)
- 7. Firemen, except locomotive and fire department
- 8. Laundry operatives and laundresses, except private family
- 9. Linemen and servicemen, telegraph, telephone, power
- 10. Mine operatives and laborers
- 11. Motormen, railway, mine, factory, etc.
- 12. Painters, except construction and maintenance
- 13. Power station operators
- 14. Sailors and decks hands, except U. S. Navy
- 15. Welders and flame-cutters
- 16. Other specified operatives and kindred workers [21]
- 17. Operatives and kindred workers (n.e.c.) by industry:
 - a. Manufacturing
 - Food and kindred products

Tobacco manufacturers
Cotton manufacturers
Silk and rayon manufacturers
Woolen and worsted manufacturers
Knit goods
Other textile-mill products
Apparel and other fabricated textile products
Lumber, furniture and lumber products
Paper, paper products, and printing
Chemicals, and petroleum and coal products
Rubber products
Footwear industries, except rubber
Leather and leather products, except footwear
Stone, clay, and glass products
Iron and steel and specified metal industries
Nonferrous metals and their products
Machinery
Automobiles and automobile equipment
Transportation equipment, except automobile [22]
Other manufacturing industries

b. Nonmanufacturing industries and services

G. Domestic Service Workers

H. Protective Service Workers

1. Firemen, fire department
2. Guards and watchmen
3. Policemen, sheriffs and marshals
4. Soldiers, sailors, marines and coast guards
(Excludes commissioned officers, professional and clerical workers, and craftsmen)

I. Service Workers, Except Domestic and Protective

1. Barbers, beauticians and manicurists
2. Boarding house and lodging house keepers
3. Charwomen, janitors and porters
4. Cooks, except private family
5. Elevator Operators
6. Housekeepers, stewards, hostesses, except private family
7. Practical nurses and midwives
8. Servants, except private family
9. Waiters and bartenders
10. Other service workers, except domestic and protective

J. Farm Laborers

K. Farmers, Except Farm and Mine

1. Fishermen and oystermen
2. Longshoremen and stevedores
3. Lumbermen, raftsmen and woodchoppers
4. Other specified laborers
5. Laborers (n.e.c.) by industry:

6. Construction
7. Manufacturing
 - a. Food and kindred products
 - b. Textiles, textile products and apparel
 - c. Lumber, furniture and lumber products
 - d. Paper, paper products and printing
 - e. Chemicals, and petroleum and coal products
 - f. Leather and leather products
 - g. Stone, clay and glass products
 - h. Iron and steel and not specified metal industries
 - i. Nonferrous metals and their products
 - j. Machinery
 - k. Automobiles and automobile equipment
 - l. Transportation equipment, except automobile
 - m. Other manufacturing industries
8. Nonmanufacturing
 - a. Railroads (including railroad repair shops)
 - b. Transportation, except railroads
 - c. Communication and utilities
 - d. Wholesale and retail trade.
 - e. Personal services [24]
 - f. Other manufacturing industries and services.

To accept this breakdown as a reasonable classification as to economic status would compel the con-

clusion that everybody listed under one, for example, "Professional and Semi-professional Workers," had the same viewpoint and mental attitude toward life as every other one. It would compel the Court to say that a dancer (a chorus girl on Main Street perhaps) had the same viewpoint and mental attitude towards life as a clergyman, regardless of race, religion, education, personality, background or geographic location. Or that a student nurse, working for a pittance, is in the same economic class as an actress making ten if not hundreds of thousands of dollars a year. And the same is true of all the other 26 occupations listed under the first heading, where the only thing in common in that heading is that they have had specialized training in widely divergent fields for the particular occupation.

The impossibility of applying this breakdown as a reasonable and rational one for other than census purposes is illustrated upon examination of all the subheads and occupations listed. It would require the Court to place in the same economic group or "class" a railroad conductor as the millionaire owner of a national chain of newspapers, for instance, or as the millionaire owner of a large oil company, or as a banker or one who owned vast quantities of rental properties. It would belabor the point to continue the comparisons, and the foregoing is sufficient to demonstrate that the occupational classifications used by the witness are completely inappropriate to determine what is a truly representative cross-section of the community with relation to any so-called "economic class."

It is equally sufficient to demonstrate that any other effort to stratify the community into "economic classes" in order to ascertain whether or not any economic class has been excluded, would result in the same kind of a legal cul-de-sac. It is also sufficient to demonstrate that the Thiel case, and the Ballard case as well for that matter, required and intended no such far-fetched conclusions or legal consequences.

I must and do, therefore, conclude that the Thiel case is limited in its holding to the proposition (1) that for a jury panel to be invalid because of discrimination there must be clear evidence of an intent on the part of the jury commissioner or the clerk, or both, to prevent or exclude, or to devise and use a system or method of selection which is calculated and intended by them, or either of them, to result in the prevention or exclusion of any person or group of persons from being called for jury service on account of, and solely because of, either their economic status, occupation, rate or time or method of pay, race, sex, religion, social affiliation or lack of it, political affiliation or the location of their [26] homes geographically in the community, and that (2) in California the power to grant exemptions and excuses is a judicial power within the excluded province of the judge, and any usurpation of that power by the clerk or jury commissioner is unlawful.

By such a construction of the Thiel case it is not only possible to apply it in the actual trial of lawsuits, but no radical departure is made from previ-

ous holding of the Supreme Court on similar questions, and as I read the Thiel case, no radical departure was intended to be made. In examining these cases it is found that in those which involved exclusion of Negroes from grand or petit juries in state courts in violation of the equal protection clause of the Fourteenth Amendment, the Supreme Court pointed out that a statute either specifically excluded Negroes or, if the statute permitted Negroes, it was so administered as to amount to a systematic and intentional exclusion of Negroes by those charged with selecting juries.

In *Strauder v. West Virginia* (1879) 100 U. S. 303, the state law which by its terms permitted only white men for jury service, was challenged as being in contravention of the Fourteenth Amendment. The Court approached the problem by stating the question to be not whether one is entitled "to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the [27] composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law solely because of their race or color, so that by no possibility can any colored man sit upon the jury." Obviously under the terms of the statute no colored man could or would be selected to serve as either a grand or petit juror, and the Court held the statute void as being in contravention of the equal protection clause of the Fourteenth Amendment.

The question postured by the above language whether "by no possibility can a colored man sit upon a jury" is the same approach which was taken by the Supreme Court in *Smith v. Texas*, with this difference: In *Smith v. Texas* they extended the inquiry to a determination whether or not conduct of officials, under a law which did not exclude colored men, was such as to evidence an intent on their part to devise a system or method which in its operation would exclude any reasonable possibility of excluding colored men. In other words, the Court in *Smith v. Texas* did no more than to extend the *Strauder* holding to cover what was an obvious and deliberate attempt on the part of the officials involved to circumvent the holding of the *Strauder* case and the statutory law of Texas by so devising a system of selection that not only resulted in having so few colored men called, but which also "almost invariably" resulted in a colored man being No. 16 on the list of 16, when only the first 12 who were qualified on the list were to be selected for the grand jury. While the testimony of the jury commissioners (only two out of 96 testified, and I suppose the Court indulged the presumption that witnesses who could be but were not produced would be adverse) showed that they did not intentionally exclude Negroes, the Court pointed out that "chance and accident" could not have been responsible for the only colored man on the list to "almost invariably" appear as No. 16. Thus the decision actually turned on the fact that the Court held that there was a systematic and intentional plan on the

part of someone to exclude Negroes. The nub of the decision, as I read it, was not the number or percentage of Negroes who did or did not appear on the list, but was the intent to exclude them.

In *Smith v. Texas* the Supreme Court did no more than to follow the pattern of inquiry which it had previously followed in *Neal v. Delaware* (1880) 103 U. S. 370; *Carter v. Texas* (1900) 177 U. S. 442; *Norris v. Alabama* (1935) 294 U. S. 587; and *Pierre v. Louisiana* (1939) 306 U. S. 354, were challenges to juries sustained under the Fourteenth Amendment; and in *Gibson v. Mississippi* (1896) 162 U. S. 565, *Smith v. Mississippi* (1896) 162 U. S. 592, and *William v. Mississippi* (1898) where challenges to juries under the Fourteenth Amendment were overruled.

In *Hill v. Texas* (1942) 316 U. S. 400, the Court held that the jury commissioner "consciously" excluded Negroes [29] and in *Akins v. Texas* (1945) 325 U. S. 398, a companion case to *Hill v. Texas*, the Court held against the challenge to the jury on the ground that the evidence showed that the jury commisisoners did not deliberately and intentionally exclude Negroes. None of these cases are contrary to what I have set forth above as the holding of the Thiel case, nor the Glasser case, nor the Ballard case.

Coming now to the evidence in this case. The jury commissioner has occupied that position for the past 16 years. Neither he nor the clerk kept records of the names or the sources of names submitted during that period of time. The commis-

sioner (who, incidentally, testified that the maximum pay received by him was approximately \$15 a year, which he has paid out, and more, in having girls copy lists of names) had to rely upon his memory, except that several comparatively recent lists he had submitted were still in the hands of the clerk and were made available and are in evidence.

The definite testimony as to these lists submitted by the commissioner goes back to the February 1944 list, since which time he has submitted a total of 6708 names, of which 4878 were taken at random by him from the telephone book, 1068 names of women at random from the Southwest Blue Book, 500 names of men from the Southwest Blue Book who lived in Pasadena and that area, 27 names of women from the Friday Morning Club, submitted to him upon his request by the management of the club, 58 names of women from the Ebell Club [30] submitted to him upon his request by the management of that club, 69 names of women from the Congress of Parent-Teachers Association, an organization consisting largely of women covering every section and the city and county, and having for its purpose the fostering of cooperation between parents and teachers, 54 names from a Japanese preacher (there were 12 men and 12 women on that list), and an unidentified number from a list of automobile owners which he had borrowed from someone.

Some point was made by the defendants concerning a list submitted by the commissioner of names of members of the Los Angeles Country Club (a

golf and social club) and of the University Club (a name which is descriptive of its membership) and the California Club (a social club consisting largely of businessmen, if not entirely), but these names did not in total exceed a few hundred, and were submitted by the commissioner at least 15 years ago. None from these sources have been submitted by him since. Of the 6708 names submitted by the commissioner since 1944, it turned out that 4104 are men and the remainder were women.

The present clerk, who has been holding his office since 1942, and prior to that time was a deputy clerk for many years, testified that he followed as near as he knew the same procedure followed by his predecessors since 1924 or 1925.

In addition to the names submitted by the commissioner, [31] the clerk has a filing cabinet with card index drawers which contain the names of 25,000 or 30,000 persons. These are referred to as his "available box." The cards have only the name, address, telephone number if there is a telephone, and previous jury service on them, and nothing else except on an old card occasionally an occupation is listed. The names have been collected by the clerk and his predecessors from various sources since 1925. Practically all of them are the names of persons who have at one time or another served on juries on previous occasions and have thus been found to be qualified under the California law, that is to say, they come within the requirements of the Code of Civil Procedure of the State of California, Sections 198, 199 and 205, requiring that they shall

be citizen over the age of 21, residents of the State and County for one year immediately before being selected, and in possession of their natural faculties and ordinary intelligence and not decrepit, and possessed of sufficient knowledge of the English language and, as prescribed by Section 205 of the Code of Civil Procedure of the State of California, of "fair character and of proved integrity and sound judgment" and have not been convicted of malfeasance in office or any other felony, and have not served upon any jury within at least two years previously.

The clerk of the court has in addition to the names supplied by the commissioner added some other names to the [32] available box of his own selection from time to time such, as he testified, some Chinese recently, the names of approximately 100 persons of the Negro race, gathered for him by one of the deputy clerks, who is also a Negro. In this connection, the commissioner also stated that he submitted some names of Negroes supplied to him upon his request by a Negro preacher. No particular point is made by the defendants concerning the alleged exclusion of Negroes. As a matter of fact, Negroes were on the February 1946 grand jury, and several of them have appeared from time to time throughout the entire last year on trial jury panels in this court. I recall one case where two Negroes were selected and served as among the 12 jurors.

These two sources, that is, the available box of the clerk and the lists submitted by the commissioner, are the sole sources of names.

The procedure followed, which the clerk testified is constantly going on, is that upon receipt of a list of names by the commissioner the clerk will select at random an approximate equivalent number of names from his available box. Since the report of the Conference of Senior Judges in 1942, Exhibit No. 2 in evidence, was received in this District questionnaires have been used on the form of Exhibit B and they have been sent to the names submitted by the commissioner and the recently selected names from the clerk's available box. [33]

Upon return of the questionnaires, the clerk and the jury commissioner go over them together after they have been alphabetically arranged and eliminate those who are incompetent to serve, that is to say, only those who appear on the face of the questionnaire either to be under age, or not citizens, or who appear not to reside any more in the state of California or this District, or not to have resided within it for for one year, and those who are practicing lawyers. Neither the clerk nor the commissioner in any manner attempt to pass on any exemptions or claimed exemption. That is and has been left entirely to the discretion of the senior judge or the judge who impanels the jury.

Upon receipt of an order by the senior judge to put names in the box, which is usually in the form of Exhibit A, tickets of exact size and color, with nothing on them except the name of the prospective juror who has returned a questionnaire, are typed. The clerk will take a sufficient number of such tickets to comply with the order. Then he and the

commissioner will each alternately pick up a ticket, read the name aloud, and drop it into what is referred to as the "master box," from which the panels are drawn. The only names discarded by either the clerk or the commissioner upon this operation is when one or the other knows that the person whose name is called has died or has moved from the community. [34] The master box is the box from which the panels are drawn when a new panel is required for service in the court. The drawing is done in the presence of the Court, the clerk and others, sometimes in chambers and sometimes in the courtroom. The venire is then issued to the marshal, the persons are summoned to appear upon a stated date and hour, at which time the senior or impaneling judge will hear the excuses and grant or deny them as in his discretion should be done. The same procedure is followed for the impanelment of the grand jury, and those names are taken from the master box as above described in identically the same fashion and originate from identically the same sources.

When the master box is emptied, the names remaining in it and those excused temporarily then go back to the clerk's available box. The names of all those jurors who serve go into another box of records kept by the clerk, which he calls the "leave-out box," where they are retained for a period of at least two years, he said usually longer, in accordance with the requirements that a person shall be disqualified under the state law for two years after his last jury duty. At the end of two or more years

these cards are again distributed to the available box, where they are subject to future random selection by the clerk in the manner above set forth.

The defendants contend that this method or system of [35] selecting jurors results in the exclusion of persons in the low income groups which are described in the motion as "laborers, people working by the day or hour, members of labor unions."

The principal evidence offered in support of this contention was the analysis and classification of occupations by the expert witness in his testimony. His bias and manner of testifying detracted considerably from the probative value of his testimony, but even so, considering his testimony in its most favorable light, it does not bear out this contention or support it. He used the 1940 census classification as the basis of his conclusions. As heretofore indicated, I do not consider those classifications as reasonable or appropriate for an inquiry of this nature, but assuming them to be correct for the purpose of applying the expert's testimony, his opinions and conclusions show that of 1103 persons selected for the 1946 and 1947 panels for whom information is available, all of the 12 classes were represented except domestic workers and farm laborers, and as heretofore noted those two classes covered only one occupation. So the effect of his testimony is that all the 167 occupations were represented in the panels except the two just mentioned. Such a result in this complex metropolitan community, with a population of over 3 million in Los Angeles County alone, scattered over an area of

over 4400 square miles, sustaining almost every conceivable kind of [36] business, industry and occupation, cannot be said to be so unfair as to be illegal under the holdings of the cases.

While the expert testified that only once in an astronomical number of times would a panel be drawn with the distribution of occupations which occurred on each of the panels, grand and petit, for 1946 and 1947, the record does not show any computation of probabilities as to the number of times 281 persons (the 1946 panel for which information is available) or 822 persons (the 1947 panel for which information is available) would be selected out of more than 3 million population, with the result that only 2 out of 167 occupations would not be represented.

In speaking of distribution of occupations, attention again is called to the fact that of approximately 350 questionnaires selected at random from those in evidence they show approximately 250 occupations given by the prospective jurors. That list of occupations is as follows:

Painter

Camera Representative

Retired on old age pension

Insurance agent

Real Estate Appraiser

Insurance Manager

Restaurant Owner

Retired

Stage and Property Hand

Furniture Repair Man

Sound Recorder

President of Trucking Company

Manager of a Lumber Business

Petroleum Engineer

Insurance Adjuster

Advertising Business

Real Estate Broker and Notary Public (who wanted to be excused because it interfered with his business)

Manager of a Motion Picture Theater, who was also a graduate lawyer and Special Deputy Sheriff

Telephone Company Employee

Investment Securities on a commission basis

Public Accountant

One-man Real Estate Loans

Railway Accountant (Retired)

Investment Counsel

Numerous "housewives" without any other indication

Statements that a parson is simply "in the banking business" or "insurance business"

Retired Florist

Owner of a bar and cafe

Geologist

Stationary Engineer

Transportation Foreman, Telephone Business

Produce Merchant [38]

Telephone Company Supervisor

Banking Business

Landlord

Field Man

Machinist

Guard
Self-employed
Housekeeper
“Write some fire insurance”
U. S. Army (Retired)
“No business”
“Not working”
Test Desk Man, Telephone Company
Ranching
Electrician
Auto Painter
Lecturer
“None”
Locomotive Engineer
Sound Technician
Electrical Trouble Shooter
Retired Merchant
Statistician
Automotive Machinist
Grocer, Produce [39]
Engineer (Production)
Produce Buyer (who starts to work at 6:00 a.m.)
Grip Man
Secretary, Life Insurance Company
Assistant Camera Man
Widow
Sales Manager
Investments
Telepone Operator
Receiving Clerk
Baker
Tank Truck Salesman

Lead Man
Nurse
Secretary
Truck Driver
"Unemployed"
Motor Man
Liaison Man in Aircraft Plant
Branch Bank Manager
Saleslady
Sound Technician
Escrow Office
Buyer in Department Store
Grocer [40]
Aircraft Worker on New Models for Test Flight
Hardware Salesman
Apartment House Manager
Tool Engineer
Retired Citizen
Oil Leasing
Interior Designer
Upholsterer
Market Research
Draftsman
Fire Insurance
Adjuster
Embalmer
Valuation Engineer
Retired Teacher
Motion Picture Industry, Technicolor, paid by
the hours worked
Income from Real Estate
Meat Cutter

Carpenter

“Not employed at present”

Dispatcher

Artist and Repertoire Phonograph Records

Traffic Manager in the Rock Business

Flight Supervisor

Pullman Porter [41]

Cleaner and Presser

Project Accountant

Engineer, Designer (Aircraft)

Non-active Member of the California Bar

Motion Picture (with the simple claim of exemption: I have to work)

Automotive Mechanic, self-employed

Sales Representative

Timekeeper

Experimental Mechanic

Mason (Contractor who is teaching G. I. apprentices the brick-laying trade)

One-man Sheet Metal Business

A widow doing clerical and stenographic duties, maintaining home for two minor sons

Model

Contractor

Tailoring Cashier

Business Manager

Carpenter

Stenographer

Service Man, Burglar Alarm

Janitor

Maintenance Mechanic

Railway Postal Clerk

Mechanic

Automobile Worker [42]

Letter Carrier

Plant Repair Man

Clerk

Radio

P. B. X. Operator

Laborer (K3), No telephone

Painting Contractor

Apartment Housekeeper

Hay and Grain Dealer

Receiving Clerk in Grocery Store

Music Composer

Appraiser

Traveling Salesman

Assistant to Manager of Credit Union at Film Studios

Stenographer, Board of Park Commission of the City of Los Angeles

Service Station Operator

Saleslady for Mausoleum

Machine Tool Maintenance Man

Foreman of the Telephone Company

Wholesale Produce Business

Retired Construction Engineer

Office Manager

Social Worker

Consignment Clerk

School Nurse [43]

Housekeeper

Design Engineer

General Foreman

Electrical Salesman
Vending Machine Collecting and Service
Secretary-Accountant
General Manager of Radio Station
Bakery Wagon Driver
Paint Department Foreman
Rancher
Journeyman Plumber
Printer's Helper
Office Work
Development Engineer
Practical Nurse
Carpenter Foreman
Stenographer
Furniture Assembler
Registered Pharmacist
Engineer, Storage Battery
Working Man in Laundry
Music Teacher
Aircraft Planner
Motion Picture Producer
Butcher and Meat Cutter [44]
Mechanic and Welder
Surveyor
Repair Man
Motion Picture Equipment Repair Man
Publicity Writer
Auditor
Commercial Fishing
Chemist
Carpenter
Structures Engineer

Grocer

Machinist

Actor

Rate and Percentage Clerk

Janitor

Architectural Designer

Cafe

Truck Driver

Ice Cream Manufacturer

Purchasing Agent

Cashier

Maintenance Foreman Air Terminal

Foreman in Metals Plant

Silver Solderer

One-man Auto Service Business [45]

Barber

Post Office Clerk

Teacher of Chemistry

Consultant Forester, Structural Pest Control

College Student

Home Maker

Service Station Operator

Pay Roll Clerk

Truck Crane Operator

Carpenter

Merchant and Apartment Hotel Operator

Owner, pest Control Service

Tool Designer, Aircraft

Rug and Carpet Salesman

Wholesale Furniture Business Owner

Ball Bearing Engineer

Garage Manager

Traffic Crossing Guard
Hotel Operator
Foreman, Inspection
Foreman, Concrete Emulsions
Actor
Investigator for the District Attorney
Credit Manager
Jeweler [46] _
Tool and Die Maker
Mechanic, Street Department, City of Culver City
Distributor
Los Angeles Park Department Foreman
Tool Maker
Fruit and Vegetable Business
Grocer
Distribution Foreman, City Water Department
Assistant Chief Clerk
Police Officer
Deputy City Clerk
Government Accountant
Housekeeper and Apartment Manager
Shop Superintendent
Pharmaceutical Sales
Foreman, Melting Department
Deputy Sheriff
Contractor, Ladies Garments
Materials and Process Coordinator of Army Air
Force
Foundryman
Welder
Electrician
Personnel Assistant, Navy Cost Inspection

Manager of Paint Company

Bank Employee [47]

Auto Electrician

Clothing Merchant

Pilot

Clerk of Textbook Department in School System

Civil Engineer

Truck Driver

Former Teacher

Post Office Clerk

Retired Editor, Publisher and Printer

Meat Market Owner

Many Retired

Numerous Housewives

Many left space blank

* * *

Now that list, of course, does not include a perfect cross-section of the community by occupation, but it does seem to me to be a fairly liberal distribution for that number of persons and does not include, by any means, an examination of all the questionnaires. It cannot be said that those occupations do not cover people who are paid by the hour or who are paid by the day. Unions cut across many of those occupations, if not most of them, and it was conceded that unions cut across all the 167 occupations included in the Census Bureau classification which was used by the expert witness. Who can say if any other method were used [48] that the result obtained would not be an exclusion of some occupational groups, or a more or a different disproportionate distribution of occupations than existed on the 1946

panel or exists on the 1947 panel? And if all occupations were represented, which in the practicalities of life is actually impossible, unless the number of juries is going to be increased far beyond 12 and actually to mob size, would not then someone make a classification of the religions of those selected, or their social connections, or their sex, or their race, or their geographical location, and come up with a statistical abstract which showed disproportionate distributions or exclusions of any of the multitude of religions represented in this community, or a disproportionate distribution or exclusion of any group which might be classified by any other common characteristic? Proportional representation is not possible, nor is it permitted or required under the law. The defendants concede that exact mathematical proportional representation is not required, but assert that disproportional distributions in which a particular occupational group is not represented is invalid. If proportional representation on a panel is not required, then disproportional representation is not invalid, unless it is the result of a systematic and intentional exclusion of persons or groups by the clerk or the commissioner, either directly or by the intentional devising of a system or method of selection, which [49] is bound to result in such systematic exclusion.

The Ninth Circuit had this question before them on June 2, 1941, after the decision of the Supreme Court in *Smith v. Texas*, in the case of *Wong Yim v. U. S.* 118 F. (2d), a case arising in Hawaii where the contention was made that the jury must "repre-

sent each nationality in the Territory” and that the list “did not contain the various percentages of persons of particular nativity,” as that percentage was calculated and set forth in the opinion. As to that contention the Court stated on page 669 of the opinion:

“The rule is that a violation of the clause (due process) occurs if in the jury there is a systematic and arbitrary exclusion of, or a discrimination between, persons of a particular race. (Citing cases, the first one of which is *Smith v. Texas*. In the instant case, there is no evidence to show that the trial jury drawn from the box was obtained either by discrimination or by excluding any name, and the mere fact that the jurors drawn from the list represented only certain races, does not show that the list was made to include only two or three races, or that it was in any manner discriminatory.”

And what applies to persons having the common characteristic of race or nationality applies as well to persons or [50] groups having other common characteristics.

The above case would seem to dispose of the contention of the defendants that the panels are invalid on constitutional or other grounds because they did not, or do not, contain “groups or classes of persons to which the defendants belong.” But there are other reasons which must be noted in not acceding to this contention. The allegations of the

indictment with respect to which group or class the defendants belong must be taken as true for the purpose of this motion, particularly as there was no evidence to the contrary. Those allegations are to the effect that the defendants "are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account, and who operate fishing boats for their own account and profit." A defendant cannot complain because there are too many businessmen on the panel and at the same time prevail because he asserts there are none.

Moreover, it is no denial of any constitutional right, even if there were no persons on the jury panel belonging to the "groups or classes of persons to which the defendants belong." Their right is to an "impartial" jury. It is the right to reject jurors and not to select them. (*Hayes v. Missouri* (1887) 120 U. S. 68; *Spies v. Illinois* (1887) 123 U. S. 131; *Brown v. New Jersey* (1889) 175 U. S. 172; *Howard [51] v. Kentucky* (1906) 200 U. S. 164.) To hold with the defendants in this connection would be to hold that as a matter of law an implied bias existed in the minds of persons of all other groups than a defendant regardless of an actual state of mind (that is the way the question was approached by Chief Justice Hughes in *United States v. Wood* (1936) 299 U. S. 123, where the constitutional question was involved in an ordinance of the District of Columbia) and for the Court to further hold that such other groups would decide cases, not from the

evidence or instructions, but from their prejudices, in spite of an oath to do otherwise. In the *Jugire* case (1891) 140 U. S. 291, the Supreme Court stated "no person is entitled by virtue of the Constitution of the United States, to have his race represented upon the grand jury that may indict him, or upon the jury that may try him." The same thing applies, as indicated, to groups having a common economic or other common characteristics. Every person is entitled not to have his race or persons with other common characteristics purposefully or intentionally and systematically excluded. There is not the slightest evidence in the record in this case that the class or group of persons to whom the defendants belong, or any other class or group, were systematically or intentionally excluded, or that the system used was calculated or intended to result in their systematic exclusion.

Under the system used by the clerk and the commissioner, [52] neither of them have any information concerning the economic status, occupation (except in unusual cases where an old card in the available box shows it), rate of pay, quantity of pay, method of pay or time of pay, nor any information concerning the race, color, religion, political affiliation or social connection or lack of them, prior to the time the information is furnished on the questionnaire by the prospective juror, and only about one-third of those are returned.

The geographic location is of course indicated approximately by the address, and the sex is, or should be, indicated by the name. There is one

exception to the foregoing statement, which is that the name selected by the commissioner from the Southwest Blue Book usually would indicate some type of social affiliation, but not necessarily so. The 1600 names submitted in 1945 from that source have gone through the process of questionnaires, and it is a fair inference that their response was not better than the average, which would reduce the number considerably. Moreover, they have been subjected to reduction by excuses and the like, so that the remaining ones have now lost all their identity in the available box of 25,000 or 30,000 names, so that it cannot be said that the use of that source is or could be any ground of illegality.

Likewise, the names secured by the commissioner from women's clubs are too small in number to be of legal significance [53] in this matter. The commissioner testified that by far the greater number of names submitted by him were taken at random from the telephone book. In selecting names he paid no attention to the type of name, he testified, or the address, or the telephone prefix, or the occupation if it was indicated, and there is no way of knowing from the telephone book the race, religion, economic status, rate, quantity or method or time of pay, political affiliation or social affiliation, or lack of them, of a person whose name is listed. The only information supplied by the questionnaire which relates to any of the above mentioned group characteristics is the occupation of the prospective juror.

Both the clerk and the commissioner testified that at no time did they together, or either one by himself, leave any name off a jury list on account of any fact relating to a person's economic status, race, religion, social affiliations, or lack of them, politics, or occupation, or rate, quantity or method or time of pay. And no evidence of any nature was offered to controvert their testimony or weaken or impeach it in any degree. Indeed, it is difficult to see how, with the paucity of information available to them about each prospective juror, they could have devised or followed any system of exclusion on any of the grounds mentioned.

Considerable point was made in argument against the commissioner's use of the telephone book. The choice of sources [54] for jurors is vested by statute in the jury commissioner and the clerk (28 U.S.C. 412). There is no master list of all the persons in this District or this county, nor is there a master list of eligible or competent or qualified persons. The largest lists of names, and hence the nearest ones to being a cross-section of the community, are contained in the city directory, the telephone directory and the voters' register. The city directory has not been published since 1942, due to the paper shortage. Assuming that a voters' printed list were available to the commissioner, the question is, does the use by the jury commissioner of the telephone directory void the jury lists? I think not.

The telephone directory, the city directory and the voters' register are each compiled without reference to race, religion, social status or lack of it,

occupation, method, rate, quantity and time of pay, political affiliation or geographical location in the area involved, except that the voters' list does of course disclose the political affiliation. It used to disclose occupation, but the voters' list does not disclose occupation any more.

No economic status is required for listing in any of the three except that a person must desire to have a telephone and be able to pay the monthly rental for it. The defendants argue that the use of the telephone directory is thus a systematic and intentional exclusion of those of the [55] working-class who cannot afford a telephone. Arguments can be made against the use of any list, as none are available for the whole population. The clerk and the commisisoner in the Thiel case used the city directory, and it is noted that such use was not condemned or commented upon by the Supreme Court.

While the Supreme Court in *Akins v. Texas* was dealing with a state jury commissioner, they very pointedly remarked that the alternative to a wide discretion in the officials charged with the selection of juries would be "a list composed of all the eligibles within the trial court's jurisdiction and selection of the panel by lot." As indicated, no such list is available, and I do not know when it is likely to be or if it ever will be.

It is true that the voters' lists would eliminate all those who were under 21, all those who have lived in California less than one year, and all those who lost their civil rights by conviction of a crime, which are grounds of disqualification of jurors. It

is also true that I or any other person might use other methods than either the clerk or the jury commissioner to secure available material or a jury list, but I cannot say because the voters' lists or some other list was not used that the methods and lists which were used by the commissioner and the clerk were illegal, or resulted in the unlawful selection of juries, either grand or petit. [56]

The making of the jury list is not a judicial act. (*Clinton v. Englbrecht*, 13 Wall 434, 446). The manner of securing names for the jury lists is for the clerk and the jury commisisoner to determine; the duty is non-delegable and no other person has a right to participate in such selection (*Walker v. U. S.* 93 F. (2d) 383, certiorari denied 303 U. S. 644; *In Re Petition for Special Grand Jury* (1931) 50 F. (2d); *United States v. Murphy*, 224 F. 554; and *Glasser v. United States* (1942) 315 U. S. 60, 85), except that a court may, under 28 U. S. C. 413, direct the jurors to be selected from such parts of the district as shall "not incur unnecessary expense or unduly burden the citizens of any part of the district."

In *United States v. McClure*, 4 F. Supp. 668, the Court stated, with relation to the duties of the officers of the District Court charged with the matter of securing jury lists, that it "is their responsibility, and no court has the right to tell the duly constituted jury commissioners how they shall discharge the duties and responsibilities imposed upon them by the law. The court has the power only to declare their actions null and void under circumstances of malfeasance or misfeasance."

While there is some language in both the majority opinion and the minority opinion in the Thiel case, as well as in the Ballard case, from which it might be argued that the [57] Supreme Court intended to say the District Judges have the power to direct the method or system to be used by the clerk and the jury commissioner in the selection of jury material, it is my judgment, in view of the holdings of the cases last cited, as well as all the other cases cited in my remarks, that this court has no such power but may only sit in review of their acts and conduct. And it is my conclusion, in the exercise of that power of review, that neither the clerk nor the commissioner showed any bias or prejudice in the selection of names or sources of names of prospective jurors, and that neither of them systematically or intentionally or arbitrarily excluded any person or persons, or groups or classes of persons, either on account or because of economic status, occupation, rate or quantity or method or time of pay, race, religion, sex, social connections or affiliations, or lack of them, or political affiliations; nor does the system and method or process used by them now or for the 1946 grand jury result in such exclusion. The geographic selections made by them were in accordance with the various orders of the senior judge made pursuant to the command and the power given him in 28 U.S.C. 413.

It follows, therefore, that the motion to dismiss the indictment and the motion to strike the 1947 jury panel are both denied. [58]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of March, A. D., 1947.

AGNAR WAHLBERG,
Official Reporter.

Los Angeles, California; March 17, 1947;
2 o'Clock p.m.

THE IMPANELMENT OF THE JURY

* * *

The Court: Very well. The Government is allowed six preemptory challenges and the defendants ten. The Government will take one and the defendants two until the remaining challenges are equal.

* * *

(The following proceedings were had outside the presence of the jury):

The Court: By the way, I stated at the commencement of the impanelment of the jury that the

Government would be entitled to six challenges and the defendants ten. Upon having another look at the rules I see that they have had changes where the punishment is either a fine or not more than a year imprisonment, where it is three to each side, but the Court may in its discretion allow more than three to the defendant, if there is more than one defendant. The Government has now exercised one and the defendants have exercised three. I would like to have a suggestion from the defendants——

* * *

Mr. Kenny: The only difficulty with that, your Honor, is having indicated ten we have challenged with that in mind. I don't think the rules can be changed in the middle of the game without working a material prejudice to the defendants, and we would have to object to it.

The Court: If you do not want any more, that is all right with me.

Mr. Kenny: We may ask for more. We will raise that when we get to ten.

The Court: I think that I will fix ten now.

* * *

Mr. Dixon: To be exercised jointly by all defendants?

The Court: By all defendants.

Mr. Margolis: That is our understanding.

* * *

(Here followed further impanelment of the jury.)

The Court: Any questions from the Government?

Mr. Dixon: No questions.

The Court: Any further questions from the defense?

Mr. Margolis: None, your Honor.

The Court: Both sides accept the jury?

Mr. Margolis: May we approach the bench?

The Court: You cannot do that. You have to get all your defendants up here.

Do you want alternates?

Mr. Dixon: Yes, your Honor.

The Court: There is room in the box for two alternates.

Mr. Andersen: May it please the Court, at this time on behalf of the defendants we represent we request the Court, pursuant to discretion imposed in the Court, to grant the defendants additional challenges. I respectfully request the number 5, bearing in mind that we represent a large number of defendants in this case. We would like to have five more pre-emptory challenges, may it please the Court.

The Court: I think ten is a fair number. The statute only permits three where ordinarily the statute permits ten. It used to permit more, but the statute seems to be case in the frame of not allowing the same latitude. I suppose that Congress had its own reasons. I think ten is sufficient. The Government cannot go on any more. They have only three in any event. I announced three before and indicated after recess that I thought that I had

made a mistake in stating the number of challenges regularly allowed and fixed ten. Counsel stated that they thought we shouldn't change in the middle of the stream and for that reason, that appeared to be a good reason to them then, and it appears to be a good reason now. The motion is denied.

Mr. Andersen: May we renew our request for more challenges?

The Court: The motion is denied.

Mr. Andersen: Three?

The Court: The motion is denied for any in excess of ten.

* * *

Is there any objection to alternate jurors?

Mr. Margolis: No objection.

The Court: The rules permit as many as four alternates. We have seats for two. It would seem to me that it might be wise in this case to have alternate jurors. I have no idea how long we are going to be.

Mr. Margolis: We have no objection.

The Court: Do you have any objection?

Mr. Garrett: I have no objection.

The Court: Does the Government have any?

Mr. Dixon: No objection, your Honor.

The Court: The Clerk will fill the box with alternates.

Rule 24(c) states in part:

"Each side is entitled to one preemptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be

impaneled, and two preemptory challenges if three or four alternate jurors are to be impaneled."

The Clerk will call two alternate jurors.

(At this point two alternate jurors were duly impaneled.)

The Court: Any questions?

Mr. Margolis: No questions.

Mr. Dixon: No questions.

Mr. Garrett: No questions.

The Court: The Clerk will swear the jury.

Mr. Andersen: Before the alternates are sworn, may it please the Court, we respectfully ask that we be granted two additional challenges in so far as the alternates are concerned.

The Court: I do not think I can do that on the alternates. In any event, that motion is denied.

Mr. Andersen: I renew the motion for one, may it please the Court.

The Court: The motion is denied for any in excess of that already taken.

* * *

(At this point a jury of 12 were duly sworn by the Clerk.)

The Court: Swear the alternates.

(At this point the two alternates were duly sworn by the Clerk.)

[Endorsed]: No. 11638. United States Circuit Court of Appeals for the Ninth Circuit. Local 36 of the International Fishermen and Allied Workers of America, Jeff Kibre, Gilbert Zafran, Clifford C. Kennison, F. R. Smith, George Knowlton, Otis W. Sawyer, W. B. McComas, Harry A. McKittrick, Arthur D. Hill, C. Lloyd Munson, Charles McLauchlan, Robert M. Phelps, Burt D. Lackyard, and Ray J. Morkowski, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed August 18, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Cr. No. 11638

LOCAL 36 OF THE INTERNATIONAL FISH-
ERMEN AND ALLIED WORKERS OF
AMERICA, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY ON
APPEAL * * *

To the Honorable Justice Francis A. Garrecht, and
Associate Justices of the United States Circuit
Court of Appeals for the Ninth Circuit:

Appellants respectfully state that the following
are the points upon which they intend to reply on
appeal, to wit:

1. The indictment on which appellants were convicted does not state a public offense against the laws of the United States;
2. The verdicts and findings of guilt are contrary to law;

3. The verdicts and findings of guilt are contrary to the evidence and the evidence is insufficient to support the verdicts;
4. The District Court erred in denying appellants' motion to dismiss the indictment on the grounds that the Grand Jury which returned said indictment was improperly selected in the respects set forth in said motion;
5. The District Court erred in denying the challenge to and motion to strike out the entire trial jury panel;
6. The District Court erred in denying appellants' motions for acquittal at the conclusion of the Government's case, and at the conclusion of all the evidence;
7. The District Court erred in admitting evidence offered by the appellee;
8. The District Court erred in excluding evidence offered by the appellants;
9. The District Court erred in instructing the jury;
10. The District Court erred in denying the motion of the above named appellants to strike all exhibits and testimony;
11. The District Court erred in granting the motion made by certain witnesses on April 18, 1947 to quash subpoena duces tecum;

12. The District Court erred in denying the motion of the above named appellants in arrest of judgment;
13. The District Court erred in overruling appellants' motion for a new trial.

* * * * *

KATZ, GALLAGHER &
MARGOLIS,
GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
KENNY & COHN,

By /s/ ROBERT W. KENNY,
Attorneys for Appellants.

Received a copy of the foregoing Statement of Points and Designation of Portions of Record upon which appellant expects to rely on appeal on this 28th day of August, 1947.

/s/ WILLIAM C. DIXON,
Attorney for Appellee.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RE ORIGINAL EXHIBITS
ON APPEAL

It Is Stipulated, subject to the approval of the United States Circuit Court of Appeals for the Ninth Circuit, that the original exhibits heretofore filed with the Court need not be printed in the record but may be referred to by the parties hereto and considered by the Court as though they were incorporated in the printed record. Any material portions of these said exhibits may be printed in the brief of either party and referred to therein.

Dated: August 21, 1947.

KATZ, GALLAGHER &
MARGOLIS,
GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
KENNY & COHN,

By /s/ ROBERT W. KENNY,
Attorneys for Appellants.

/s/ WILLIAM C. DIXON,
Attorney for Appellee.

Pursuant to the foregoing, It Is So Ordered:

Dated: This 30th day of August, 1947.

/s/ FRANCIS A. GARRECHT,
Judge.